(7)

No. 84-435-CFY
Status: GRANTED

Title: Robert Russell, Petitioner
v.
United States

Docketed:
September 17, 1984

Court: United States Court of Appeals
for the Seventh Circuit

Counsel for petitioner: Echeles, Julius L.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Sep 17 1984	G	Petition for writ of certiorari filed.
2	Sep 24 1984		Waiver of right of respondent United States to respond filed.
3	Oct 3 1984		DISTRIBUTED. October 26, 1984
4	Oct 19 1984	P	Response requested. (Due November 19, 1984 - NONE RECEIVED)
5	Nov 6 1984		Record filed.
6	Nov 6 1984		Certified C.A. proceedings received.
8	Nov 19 1984		Order extending time to file response to petition until December 19, 1984.
9	Nov 24 1984		Record filed.
10	Dec 21 1984		Brief of respondent United States in opposition filed.
11	Dec 26 1984		REDISTRIBUTED. January 18, 1985
13	Feb 1 1985		REDISTRIBUTED. February 15, 1985
14	Feb 19 1985		Petition GRANTED. Justice Powell OUT.
			**********
15	Mar 1 1985		Brief of petitioner Robert Russell filed.
16	Mar 14 1985	G	Motion of the Solicitor General to permit Christopher J. Wright, Esquire, to present oral argument pro hac vice filed.
18	Mar 25 1985		Motion of the Solicitor General to permit Christopher J. Wright, Esquire, to present oral argument pro hac vice GRANTED. Justice Powell OUT.
19	Mar 25 1985		SET FOR ARGUMENT, Wednesday, April 24, 1985. (2nd case).
20	Apr 5 1985		CIRCULATED.
21	Apr 4 1985	X	Brief of respondent United States filed.
22	Apr 12 1985	X	Joint appendix filed.
23	Apr 17 1985	X	Reply brief of petitioner Robert Russell filed.
24	Apr 24 1985		ARGUED.

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No. 84-435

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT RUSSELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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26PP

QUESTIONS PRESENTED

1. Whether the holding by the Seventh Circuit—that residential property* is encompassed within 18 U.S.C. 844(i)—conflicts with the Second Circuit's unequivocal position that it is not within the statute.†

2. Whether residential property falls within the ambit of 18 U.S.C. 844(i).

3. Whether the use of interstate gas to heat the building is ground, nonetheless, for invoking federal jurisdiction.

PARTIES INVOLVED [per Rule 21.1(b)]

Petitioner, Robert Russell, was the defendant in the District Court for the Northern District of Illinois, Eastern Division, and appellant in the Court of Appeals for the Seventh Circuit. Respondent, United States of America, was plaintiff in the District Court, and appellee in the Court of Appeals.

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* Per undisputed facts, (see Stip., R. 30, p. 1), the property here in issue was a two-flat residential building; at the time in question, the ground floor was vacant, and a single family rented the second floor. (Tr. 98-100, 104-05)

† *United States* v. *Mennuti*, 639 F.2d 107 (2 Cir. 1981); *accord*, *United States* v. *Barton*, 647 F.2d 224, 232 & 232 n.8 (2 Cir. 1981), distinguishing and adhering to *Mennuti*.

Also in harmony with the Second Circuit is the Tenth; see *United States* v. *Monholland*, 607 F.2d 1311 (10 Cir. 1979).

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In the
Supreme Court of the United States

OCTOBER TERM, 1983

NO.

ROBERT RUSSELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Robert Russell (hereafter, defendant), prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit, affirming his conviction and sentence for attempted arson in violation of 18 U.S.C. 844(i).

Judgment, Opinion and Order Below

The Opinion of the Court of Appeals for the Seventh Circuit, No. 83-2580, not yet published, is set out as Appendix A.

The Memorandum Order of the District Court for the Northern District of Illinois, Eastern Division, No. 83 CR 114, is reported: *United States* v. *Russell*, 586 F.Supp. 1085 (N.D.Ill. 1983).

Jurisdictional Statement

On June 27, 1984, the Court of Appeals for the Seventh Circuit filed its Opinion herein. (App. A) Defendant's timely Petition for Rehearing was denied, with original opinion amended, on July 25, 1984. (App. B) This petition to review the judgment of a federal court of appeals is timely filed within 60 days after denial of petition for rehearing. Jurisdiction is invoked under 28 U.S.C. 1254(1) and Rules 20.1 and 20.4 of this Court.

Statute Involved

18 U.S.C. 844(i) provides, in pertinent part:

> "Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building . . . used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; . . ."

STATEMENT OF THE CASE

Nature of the Case

Defendant was charged (R. 8)[1] with having attempted to damage and destroy a two-unit apartment building in Chicago, Illinois which was used in an activity affecting interstate commerce, by means of fire and explosive, in violation of 18 U.S.C. 844(i).

Defendant's pre-trial motion to dismiss the indictment on grounds the statute does not apply to residential buildings, (R. 17), was denied. (R. 20, 23) At the close of all the evidence, the court denied defendant's motion for judgment of acquittal. (R. 34)

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[1] Hereafter: "R." refers to the Record on Appeal, and "Tr." to the Transcript of Proceedings.

The court found defendant guilty as charged, (R. 34) and sentenced him to 10 years. (R. 35) The Court of Appeals for the Seventh Circuit affirmed, (App. A), and although defendant's timely petition for rehearing was denied, the opinion was amended. (App. B)

Jurisdiction of Trial Court [per Rule 21.1(i)]

Jurisdiction in the court of first instance is based upon 18 U.S.C. 3231, which provides in part that "The district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." Defendant was charged with having committed an offense against a law of the United States, to wit, 18 U.S.C. 844(i).

Statement of Facts

Evidence pertaining to the attempt itself—not relevant to the issues of the statute's scope and/or the District Court's jurisdiction—is omitted in the interest of brevity.[2]

Per the undisputed facts, (Stip., R. 30, p. 1), the property was a two-flat building; at the pertinent time, the ground floor was vacant, and a single family occupied the second floor, renting from the owner (defendant). (Tr. 98-100. 104-05) Natural gas [arguably] originating outside Illinois was used to heat the second floor apartment. (Tr. 119)

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[2] In the District Court, and on appeal—but not in this Court—defendant contended the evidence was insufficient to establish the offense, because (a) no "attempt" had been proven as to him and/or his alleged agent-accessory, (see App. A, pp. 3-4), and (b) the proof was deficient that the natural gas used to heat the premises was in interstate commerce. (See Tr. 121-34)

REASONS FOR GRANTING THE WRIT

The decision below—that residential property is encompased within 18 U.S.C. 844(i)—conflicts with the Second Circuit's unequivocal position [as stated in United States v. Mennuti, 639 F.2d 107 (2 Cir. 1981)],[3] adhered to in United States v. Barton, 647 F.2d 224, 232 (2 Cir. 1981), that such property is not within the statute.

The Seventh Circuit impermissibly has extended the statute beyond its intended scope, and erroneously and illogically purports to distinguish Mennuti—which is functionally indistinguishable from this case.

Nor can the decision be justified on grounds that interstate gas was used to heat the building—a ground expressly rejected in Mennuti.

Certiorari should be allowed to permit this Court to interpret the scope of the statute and to resolve a direct conflict amongst the Circuits.

• • •

Synopsis of Argument

Residential property does not fall within the ambit of the statute. The Seventh Circuit's decision to the contrary conflicts with decisions from two sister Circuits.

Use of interstate fuel does not bring non-commercial, residential property within the statute's scope. Not

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[3] In harmony with *Mennuti*, and thereby also conflicting with the instant decision, is the Tenth Circuit in *United States* v. *Monholland*, 607 F.2d 1311 (10 Cir. 1979). *Mennuti* squarely conflicts with the instant case, for both *Mennuti* and *Russell* involved purely residential property, while *Monholland*, which involved personal property (a truck), inferentially conflicts with *Russell*.

only must the property be "used" in interstate commerce"; it must be commercial property.

The property here was not commercial property.

This case is functionally indistinguishable from *Mennuti, supra.*

Congressional intent.

• • •

Residential Property Does Not Fall Within the Ambit of the Statute. The Seventh Circuit's Decision To The Contrary Conflicts With Decisions From Two Sister Circuits.

Per the undisputed facts, (Stip., R. 30, p. 1), the property in issue was a two-flat building; at the time in question, the ground floor was vacant and a single family rented the second floor. (Tr. 98-100, 104-05) The District Court's determination[4] that federal jurisdiction nonetheless exists (R. 20, 34), affirmed on appeal, (App. A), conflicts with decisions from two different Circuits—the Second and Tenth. *United States* v. *Mennuti,* 639 F.2d 107 (2 Cir. 1981); *United States* v. *Monholland,* 607 F.2d 1311 (10 Cir. 1979) (See fn. 3, *supra.*)

Directly on point, *Mennuti* affirmed the District Court's dismissal of the indictment under sec. 844(i) where, as here, the alleged target of the explosives was a residential, not a commercial, building. Similarly, *Monholland, supra,* held that the statute does not apply to destruction of a truck used by a State judge travelling to and from work, though the truck used fuel from interstate commerce, was insured by an interstate company, etc.

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[4] The District Court twice ruled on this issue—first in denying defendant's pre-trial motion to dismiss, (R. 17 [motion]; R. 20, 23 [denial]—opinion printed at 563 F.Supp. 1085 (N.D. Ill. 1983), and again in denying the motion for acquittal at the close of all the evidence. (R. 34)

All those cases finding the statute applicable—without exception—involved commercial property.[5] No case was discovered wherein purely residential property—as here—was deemed subject to the statute.[6]

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[5] In *United States* v. *Barton*, 647 F.2d 224, 232 & 232 n.8 (2 Cir. 1981) (gambling operations), and *United States* v. *Giordano*, 693 F.2d 245, 250 (2 Cir. 1982) (piano store), the Court distinguished and adhered to its prior *Mennuti* holding. In *United States* v. *Andrini*, 685 F.2d 1094, 1096 (9 Cir. 1982), the Court listed *Mennuti* and *Monholland*, *supra*, as the only cases wherein Circuit Courts have not found §844(i) jurisdiction, "neither of which involved *commercial* property." (Emphasis in original.) The property held subject to the statute in *Andrini* was a commercial building under construction. See, *e.g.*, *United States* v. *Nashawaty*, 571 F.2d 71 (1 Cir. 1978) (paint shop); *United States* v. *Sweet*, 548 F.2d 198, 202 (7 Cir. 1977) (tavern); *United States* v. *Schwanke*, 598 F.2d 575, 578 (10 Cir. 1979) (cafe); *United States* v. *Corbo*, 555 F.2d 1279, 1282 (5 Cir. 1977) (bookstore); *United States* v. *Keen*, 508 F.2d 986, 990 (9 Cir. 1974) (commercial fishing boat); *United States* v. *Belcher*, 577 F.Supp. 1241, 1242-44 (E.D. Va. 1983) (restaurant).

[6] *United States* v. *Fears*, 450 F.Supp. 249 (E.D. Tenn. 1978), relied on by the District Court, (R. 20, p. 5), did not involve sec. 844(i), but, rather, sec. 844(e), which prohibits *use of the telephone* to threaten to damage or destroy "any building" by explosives. Sec. 844(e)'s specification of "use of the . . . telephone . . . or other instrument of commerce" thus provides the interstate nexus via the means of conveying a threat or false information *re* harm to any individual or building; see 450 F.Supp. at 252, quoting from sec. 844(e). Thus, the *Fears* court's decision that sec. 844(e) includes residential property within the phrase "any building" is not determinative with respect to sec. 844(i)—the statute here in issue—which does not involve interstate commerce by virtue of use of a "telephone . . . or other instrument of commerce."

Moreover, the legislative history of sec. 844(e) does not include any indication that Congress did not intend "any building" to mean, literally, *any* building, see 450 F.Supp. at 253, whereas the history of sec. 844(i) *does* contain material limiting the applicability of sec. 844(i) to *business* (as opposed to residential) property. *Mennuti*, *supra*, 639 F.2d at 111-12, quoting from House Report No. 91-1549.

Use of interstate fuel does not bring non-commercial, residential property within the statute's scope. Not only must the property be "used in interstate commerce"; it must be commercial property.

In describing the property covered by 18 U.S.C. 844(i), the Congressional committee used these words:

> ". . . business property used in . . . commerce or in an activity affecting . . . commerce, not . . . dwelling houses which were not being used for any commercial purpose at all." *Mennuti, supra,* 639 F.2d at 111-12, quoting from House Report No. 91-1549, [1970] U.S. Code Cong & Adm News 4007, at 4046, Organized Crime Control Act of 1970.

It is not enough that there is some federal connection such as use of fuel in interstate commerce; the property must be business, not residential, property for the statute to apply. Examination of cases construing the statute demonstrate that on the facts, courts apply a two-pronged test: is the building a commercial building, and is it used in (or in an activity affecting) commerce? Both these elements must exist on the facts to establish violation of the statute.

For example, in *United States* v. *Belcher,* 577 F.Supp. 1241 (E.D. Va. 1983), the District Court found federal jurisdiction under 18 U.S.C. 844(i) where the building was "a commercial building wherein out-of-State goods were sold . . ." *Id.* at 1245. The Court held:

> "violation of § 844(i) minimally requires destruction *of a commercial building* wherein a business buys and sells goods passing in interstate commerce." *Ibid.* (Emphasis added.))

In *Barton, supra,* the Court found that consumption in the building of coffee and orange juice from out-of-State, *and* use of out-of-State fuel in heating the building, constituted "alternative jurisdictional predicates." 647 F.2d at 232-33.

Never before has the mere use of interstate fuel been the basis—as here—for finding federal jurisdiction in a residential, not a commercial, building.

In *Mennuti* itself, *supra,* 639 F.2d at 110, the Court expressly rejected the position adopted by the District Court herein, (see *United States* v. *Russell,* 563 F.Supp. 1085, 1086 (N.D. Ill. 1983)), adhered to by the Seventh Circuit. (App. A. p. 2.) There, in response to the government's offer of proof—which included that "telephone lines, electric lines, and other services provided at . . . [the residence] traveled in interstate commerce and affected interstate commerce," 639 F.2d at 108-09, n.1, par. 5—the Second Circuit flatly rejected the argument that such proof establishes jurisdiction:

> "[A] residence is not used in interstate or foreign commerce simply because . . . it received electric power and telephone service from companies engaging in or affecting commerce . . ." *Id.* at 110.

Similarly, analyzing *Mennuti,* the Second Circuit in *Barton, supra,* noted that the statute "does not apply to private dwellings, notwithstanding several interstate contacts involving . . . fueling." 647 F.2d at 232 n.8. See also *Monholland, supra.*

Several Second Circuit cases decided subsequent to *Mennuti* expressly have reaffirmed that decision, finding federal jurisdiction on their respective facts where *commercial* property was involved. In *United States* v. *Barton, supra,* decided a few months after *Mennuti,* the reviewing court found that the buildings in question (which housed gambling operations):

> ". . . were used in activities affecting interstate commerce within the meaning of §844(i). There was ample evidence that *the buildings were used for commercial activities.*" 647 F.2d at 232. (Emphasis added).

The Court noted:

> "This [*i.e.*, that the buildings were used for commercial activities] distinguishes our recent decision in . . . [*Mennuti*], in which we held that §844(i) does not apply to private dwellings, notwithstanding several interstate contacts involving financing, insurance, fueling, and use of building materials." *Id.* at 232 n.8.

And in *United States* v. *Giordano*, 693 F.2d 245 (2 Cir. 1982), the Court held a piano store fell within the ambit of the statute. Specifically holding that this decision was consistent with *Mennuti*, the Court stated:

> "*Mennuti* held that only commercial enterprises are covered by the statute; there is no claim here [*i.e.*, in *Giordano*] that defendants conspired to destroy a residential building, as in *Mennuti*." 693 F.2d at 250.

In *United States* v. *Andrini*, 685 F.2d 1094 (9 Cir. 1982), the property held to be subject to the statute was a commercial building under construction. In the course of its opinion, the Court stated:

> "We have discovered only two cases in which circuit courts have not found §844(i) jurisdiction, neither of which involved *commercial* property." [Citing *Mennuti* and *Monholland, supra.*] *Id.* at 1096. (Emphasis in original.)

Each of the cases finding federal jurisdiction under the statute involves property which was used commercially. See cases cited in fn. 5, *supra*.

The Property Here Was Not Commercial Property.

The Seventh Circuit's position, (App. A, p. 3), adopting that of the District Court, (R. 20, pp. 1-2), characterizing the property as business or commercial property because defendant treated it as income property, confuses the quality of the property with the characterization of defendant. No authority has been advanced in support of this novel

position, that the manner in which a person treats property—despite the objective facts—can bring federal jurisdiction into play. Defendant's conviction should not be permitted to stand on the basis of unfounded theory. Considering the objective facts, the property here was purely residential. As such, it is not covered by the statute.

This Case is Functionally Indistinguishable From Mennuti.

The facts in *Mennuti* itself included that one of the two dwellings involved was used as rental property not occupied by the owner. 639 F.2d at 109, n.1, par. 6. Thus, the Seventh Circuit's purported distinction between Russell's case and *Mennuti,* on the basis that, "At the time of the incident in question, Russell lived in neither unit of the . . . property," (App. A, p. 3), is revealed as spurious. The defendant in *Mennuti* did not live in the pertinent property either, but rented it to a tenant, as did defendant. (Tr. 98-100, 104-05) See *Mennuti,* 639 F.2d at 109 n.1.

Both in deciding that on the facts, the building in this case is not "purely residential" as was the building in *Mennuti,* and in adopting the position that use of interstate natural gas to heat the building is grounds for federal jurisdiction,[7] the Seventh Circuit's opinion directly conflicts with *Mennuti*—despite the Court's self-serving disavowal (App. A, p. 3) that any conflict exists.

Congressional Intent

The legislative history of sec. 844(i) contains the telling language:

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[7] The Seventh Circuit here, (App. A, p. 2), expressly adopted the District Court's position respecting the natural gas issue. See *United States* v. *Russell,* 563 F.Supp. 1085, 1086 (N.D. Ill. 1983).

> "[T]his is a very broad provision covering substantially all *business* property." [1970] U.S. Code Cong & Adm News 4007, at 4046, House Report No. 91-1549, Organized Crime Control Act of 1970, quoted in *Mennuti, supra,* 639 F.2d at 111. (Emphasis added.)

Describing "business property," the Congressional Committee referred to:

> "the type of conduct punished by the statute [18 U.S.C. 844(i)], namely, the damage or destruction by explosion of *business property used in . . . commerce or in an activity affecting such commerce, not to dwelling houses which were not being used for any commercial purpose* at all." *Id.,* in 639 F.2d at 111-12.

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Considering all the foregoing—including the legislative history as noted above—this Court should establish and confirm, as the law of the land, the principle set forth by Judge Friendly in his well-reasoned *Mennuti* opinion, speaking for the Second Circuit in a position subsequently followed in *Barton* and *Giordano,* all *supra:*

> "We are not holding that Congress could not, with appropriate findings and language, make it a federal crime to do what appellees were charged with doing here. We hold only that Congress did not choose, as the Government contends, to make nearly every bombing in the country a federal offense; it limited its reach to property currently used in commerce or in an activity affecting it, leaving other cases to enforcement by the states." *Mennuti, supra,* 639 F.2d at 113.

Certiorari should be allowed so that this Court may resolve the clear conflict between the Seventh and Second Circuits created by the instant decision. And, on the merits, the position of the Second Circuit should be adopted as the proper interpretation of the statute, 18 U.S.C. 844(i).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for Petitioner

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 83-2580

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT RUSSELL,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 83 CR 114—Susan Getzendanner, *Judge.*

ARGUED MARCH 26, 1984—DECIDED JUNE 27, 1984

Before BAUER, WOOD, and ESCHBACH, *Circuit Judges.*

BAUER, *Circuit Judge.* A federal grant [sic] jury indicted Defendant Robert Russell for attempting to damage and destroy by fire or explosive, in violation of 18 U.S.C. § 844(i) (1982),[1] a two-unit apartment building at

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[1] 18 U.S.C. § 844(i) (1982) states in relevant part:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce will be imprisoned for not more than ten years or fined not more than $10,000.00, or both . . . .

4530 South Union Street, Chicago, Illinois. The district court denied Russell's motion to dismiss for lack of federal jurisdiction. 563 F. Supp. 1085 (N.D. Ill. 1983). The defendant was tried by a jury, convicted, and sentenced to ten years imprisonment. The defendant appeals on the grounds that the court lacked jurisdiction, that the evidence was insufficient to support his conviction, and that his sentence was improper. We affirm on each issue.

The district court held that the South Union Street property was within the ambit of Section 844(i) because "the creation of heat from natural gas originating out of state is an 'activity affecting interstate or foreign commerce.'" 563 F. Supp. at 1086. The defendant claims that the district court lacked jurisdiction because the building that he was accused of attempting to damage was residential property and Section 844(i) is inapplicable to residential buildings. The defendant relies principally on *United States* v. *Mennuti*, 639 F.2d 107 (2d Cir. 1981), to support his contention. In *Mennuti*, the trial court dismissed an indictment which charged the defendant with the destruction of two single-family residences. The Second Circuit affirmed the dismissal, stating that the legislative history of Section 844(i) revealed that the section does not apply to "dwelling houses which were not being used for any commercial purpose at all." 639 F.2d at 111. The district court in the case at hand held that although the South Union Street property was used as a residential property the court had jurisdiction under Section 844(i) because of the "expansive interpretations of the language of § 844(i)" that this court used in *United States* v. *Sweet*, 548 F.2d 198 (7th Cir.), *cert. denied*, 430 U.S. 969 (1977). The district court expressly refused to apply *Mennuti* because it did "not announc[e] the law of this circuit." 563 F.Supp. at 1087.

We agree with the district court that *Sweet* sanctions an expansive reading of Section 844(i). In *Sweet*, the defendant was a tavern owner convicted under Section 844(i) for his role in the fire-bombing of a competing tavern. The fire destroyed the physical structure of the

tavern and its stock of liquor and beer that had originated out of state but had been purchased locally through distributors. The defendant in *Sweet* argued that the tavern was not being used in an activity affecting interstate commerce. This court affirmed jurisdiction and concluded that "[t]he punishment in § 844(i) of the unlawful use of explosives in an interstate activity, but which has an effect on interstate commerce although *de minimis,* is within the power of Congress to enact as an appropriate means to accomplish a legitimate end under the commerce power." 548 F.2d at 202.

We do not think that it is necessary in this case, however, to reject the more restrictive interpretation of Section 844(i) in *Mennuti,* and thus create a conflict with the Second Circuit, in order to uphold the district court's jurisdiction. The district court also stated that even "when conceding the propriety of the suggested limitations [imposed by *Mennuti*] . . . , [f]rom the perspective of the defendant, the building on South Union Street was very definitely 'business property' within the meaning of [Section 844(i) and its legislative history]." 563 F. Supp. at 1088. The facts in this case amply support this finding. The South Union Street apartment building was one of four pieces of property that Russell owned and rented to tenants. Russell's income tax returns from 1976 through 1982 demonstrated that Russell treated these properties as income property for which he claimed business deductions for depreciation and expenses. These properties also were covered by business fire insurance policies, in contrast to the defendant's own residence which he covered by a homeowner's policy limited to owner-occupied premises. At the time of the incident in question, Russell lived in neither unit of the South Union Street property. The district court's jurisdiction thus could be based on the fact that this property was business or commercial property under Section 844(i), and we affirm the court's jurisdiction on this basis.

Russell next contends that the evidence at trial was insufficient to establish beyond a reasonable doubt the

attempt element of the crime. This argument is without merit. The record is replete with evidence on which a jury could find that the defendant did some act in an effort to bring about or accomplish a violation of Section 844(i). We think that it is unnecessary to review all of those facts here.

Russell's final argument is that the district court abused its discretion when it sentenced him by refusing to refer the defendant first for a psychiatric evaluation. This argument is based primarily on the defendant's contention that his conduct in this case "may well have been influenced by [a] tragic early experience"—a fire which killed two of Russell's siblings when he was only six years old. Appellant's br. at 24 n.17. The trial court is given wide discretion in determining to what length it will delve into the defendant's past to arrive at the appropriate sentence. *See United States* v. *Brubaker*, 663 F.2d 764, 768 (7th Cir. 1981). The court is not required to consider every "possibly relevant" factor, as Russell contends it should, when making a sentencing determination. It is enough for the court to consider sufficient information "to enable it to exercise its sentencing discretion in an enlightened manner," *United States* v. *Stephens*, 696 F.2d 534, 537 (11th Cir. 1983). The record reveals that the district court ably did so in this case.

For the above reasons, the defendant's conviction and sentence are affirmed.

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 25, 1984.

Before

Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Jesse E. Eschbach, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 83-2580 vs.

ROBERT RUSSELL,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 83 CR 114
Susan Getzendanner, Judge.

ORDER

The court hereby orders that the opinion published in the above-entitled cause on June 27, 1984, be amended as follows:

(1) On page 2, line 4, strike the words "by a jury."

(2) On page 4, line 2, change "jury" to "trier of fact."

Further, in consideration of the petition for rehearing filed in the above-entitled cause by Defendant-Appellant Robert Russell, all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It is ordered that the petition for rehearing be, and the same is hereby, DENIED.

(2)

No. 84-435

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT RUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-435

ROBERT RUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the attempted arson of an income-producing property he owned was not punishable under 18 U.S.C. 844(i), which prohibits arsons of "any building * * * used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."

Following a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of attempting to destroy by fire a two-unit apartment building, in violation of 18 U.S.C. 844(i). He was sentenced to ten years' imprisonment. The court of appeals affirmed (Pet. App. 1-4).

1. Petitioner, a member of the Chicago Fire Department, owned four buildings. He earned rental income from the buildings and treated them as business properties for tax purposes, claiming deductions for depreciation and expenses. One of these buildings was a two-unit apartment

building at 4530 South Union. The bottom floor was rented to a woman who occupied the premises sporadically in February 1983. The upstairs apartment was rented to a family of eight.[1] Tr. 20, 30, 98-103, 150, 156.

To avoid fines for housing code violations and the cost of making repairs to the building, petitioner hired Ralph Branch (who had recently been released from prison) to set fire to the building. When Branch asked petitioner how his tenants would escape the fire, petitioner replied, "* * * if they do they do, if they don't, they don't." Petitioner showed Branch how to start the fire by using a natural gas line in the basement (Tr. 31-36, 50).

In order to provide petitioner with an alibi, the arson attempt was scheduled for the evening of February 8, 1983, when petitioner was on duty at the fire station. The attempt failed, however, and petitioner demanded that Branch try again on February 10 with a can of gasoline petitioner provided (Tr. 38-46).

After meeting with petitioner, Branch reported the planned arson to the FBI and agreed to tape record a telephone conversation with petitioner. During the conversation, petitioner asked Branch if he was going to start the fire that evening, and Branch assured petitioner that he would. Petitioner then told Branch where he had placed the can of gasoline. Petitioner was arrested following the conversation, and the fire was never set (Tr. 46-50).

2. Prior to trial, petitioner moved to dismiss the indictment, alleging that there was no federal jurisdiction for the offense. The district court denied the motion on the ground that interstate commerce was affected because the building used natural gas supplied from other states. 563 F. Supp.

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[1]The building was heated with natural gas, piped into Illinois from other states (Tr. 121-122).

1085 (N.D. Ill. 1983). The court also rejected, as did the court of appeals, petitioner's claim that apartment buildings are excluded from the statute. Both courts concluded instead that the building in question was a "business property." Accordingly, the court of appeals distinguished this case from *United States* v. *Mennuti*, 639 F.2d 107 (1981), in which the Second Circuit held that Section 844(i) does not apply to " 'dwelling houses which were not being used for any commercial purposes at all.' " Pet. App. A2, quoting 639 F.2d at 111-112. See also 563 F. Supp. at 1088.

3. There is no merit to petitioner's claim that Section 844(i) does not apply to attempted arson of apartment buildings. The plain language of the statute covers (emphasis added) "attempts to damage or destroy, by means of fire or an explosive, *any building*, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce * * *." In contrast to petitioner's cramped interpretation, "[n]othing on the face of the statute suggests a congressional intent to limit its coverage to [nonresidential buildings]." *Garcia* v. *United States*, No. 83-6061 (Dec. 10, 1984), slip op. 3, quoting *Lewis* v. *United States*, 445 U.S. 55, 60 (1980).

Nor does the decision below conflict with either *United States* v. *Mennuti, supra*, or *United States* v. *Monholland*, 607 F.2d 1311 (10th Cir. 1979). In *Mennuti*, the Second Circuit held that the statute did not apply to two private dwellings because only "business-related activities" satisfy the commerce element of Section 844(i). But unlike the dwellings in *Mennuti*,[2] the apartment building here was one

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[2]In *Mennuti*, one of the dwellings was owned by Mennuti's wife and was the private residence of the Mennuti family. The other dwelling was a rental property that was owned by someone other than appellees Mennuti and Natale. Neither dwelling was a business property owned by the defendant, unlike the apartment building here. See 639 F.2d at 108 n.1.

of four income-producing business properties owned by petitioner. Petitioner deducted depreciation and expenses relating to these properties on his tax returns. And, he purchased "business" rather than "homeowner" insurance policies for the buildings (Tr. 150-154). Accordingly, as the court below concluded, this case is distinguishable from and does not conflict with *Mennuti.*

The claim of conflict with *Monholland* fares no better. In that case, the defendants blew up a pick-up truck that a state judge used for commuting to work. The Tenth Circuit held that Section 844(i) did not apply because the truck was not business property and did not affect interstate commerce. Obviously, *Monholland* has no bearing on the instant case, where both courts below determined that petitioner's rental properties were "business" properties.

Finally, petitioner contends (Pet. 7-9) that the use of interstate fuel does not bring "non-commercial residential property" within the ambit of Section 844(i). This argument is beside the point since the lower courts concluded that the apartment building was indeed commercial property. Accordingly, the question whether the use of interstate fuel can bring a private dwelling within the scope of the statute is not presented here.[3]

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[3]See *United States* v. *Barton,* 647 F.2d 224, 231-232 (2d Cir.), cert. denied, 454 U.S. 857 (1981) (approving jury instruction that " '[a] building is used * * * in an activity [a]ffecting interstate commerce * * * if oil or gas moving in interstate commerce is used to heat the building' "); cf. *United States* v. *Schwanke,* 598 F.2d 575 (10th Cir. 1979); *United States* v. *Sweet,* 548 F.2d 198 (7th Cir. 1977).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1984

DOJ-1984-12

(3)

No. 84-435

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT RUSSELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

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BRIEF FOR PETITIONER

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether the holding by the Seventh Circuit—that residential property is encompassed within 18 U.S.C. 844(i)—conflicts with the Second Circuit's unequivocal position that it is not within the statute.*

2. Whether residential property falls within the ambit of 18 U.S.C. 844(i).

3. Whether the use of interstate gas to heat the building is ground, nonetheless, for invoking federal jurisdiction.

PARTIES INVOLVED

The caption of the case in this Court identifies all the parties.

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* *United States* v. *Mennuti*, 639 F.2d 107 (2 Cir. 1981); *accord*, *United States* v. *Barton*, 647 F.2d 224, 232 & 232 n.8 (2 Cir. 1981), distinguishing and adhering to *Mennuti*.

Also in harmony with the Second Circuit is the Tenth; see *United States* v. *Monholland*, 607 F.2d 1311 (10 Cir. 1979).

The Eighth Circuit declined to "go as far as the Seventh Circuit" in *United States* v. *Hansen and Terlecky*, Nos. 84-1500 & -1501, decided February 22, 1985, discussed *infra*.

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BRIEF FOR PETITIONER

Opinion and Judgments Below

The Opinion of the Court of Appeals for the Seventh Circuit No. 83-2580, is reported: *United States* v. *Russell*, 738 F.2d 825 (7 Cir. 1984).

The Memorandum Order of the District Court for the Northern District of Illinois, Eastern Division, No. 83 CR 114, denying petitioner's pre-trial motion to dismiss for lack of federal jurisdiction, is reported: *United States* v. *Russell*, 563 F.Supp. 1085 (N.D. Ill. 1983).

Jurisdictional Statement

The Opinion of the Seventh Circuit was decided June 27, 1984, and, on defendant Russell's timely petition for rehearing, was amended on denial of rehearing on July 25, 1984. *United States* v. *Russell*, *supra*, 738 F.2d 825, at 825. The Petition for Certiorari to review the judgment of a federal court of appeals was timely filed on September 17, 1984, within 60 days after denial of petition for rehearing. Jurisdiction is invoked under 28 U.S.C. 1254(1) and Rules 20.1 and 20.4 of this Court. This Court granted the Petition for Certiorari on February 19, 1985.

Statute Involved

18 U.S.C. 844(i) provides, in pertinent part:

> "Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire, or an explosive, any building . . . used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; . . ."

STATEMENT OF THE CASE

Nature of the Case

Petitioner was charged (R. 8)[1] with having attempted to damage and destroy a two-unit apartment building in Chicago, Illinois which was used in an activity affecting interstate commerce, by means of fire and explosive, in violation of 18 U.S.C. 844(i).

Petitioner's pre-trial motion to dismiss the indictment on grounds the statute does not apply to residential build-

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[1] Hereafter: "R" refers to the Record on Appeal in the Seventh Circuit in No. 83-2580, and "Tr." to the Transcript of Proceedings (a part of said Record).

ings, (R. 17), was denied.[2] (R. 20, 23) At the close of all the evidence, the court denied petitioner's motion for judgment of acquittal and found him guilty as charged. (R. 34) Petitioner was sentenced to 10 years. (R. 35) The Court of Appeals affirmed. *United States* v. *Russell*, 738 F.2d 825 (7 Cir. 1984).

Statement of Facts[3]

Per the undisputed facts, (Stip., R. 30, p. 1), the property [4530 S. Union, Chicago, Illinois] was a two-flat residential building; at the pertinent time, the ground floor was vacant, and a single family rented the second floor from the owner (petitioner, Russell). (Tr. 98-100, 104-05) The building was one of four owned by petitioner, from which he earned rental income. He treated them as business properties for tax purposes.[4] Stip., R. 30) Natural gas

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[2] *United States* v. *Russell*, 563 F.Supp. 1085 (N.D. Ill. 1983).

[3] Evidence pertaining to the attempt itself—not relevant to the issues before this Court respecting the statute's scope and/or the District Court's jurisdiction—is omitted in the interest of brevity.

In the District Court and on appeal—but not in this Court—petitioner contended the evidence was insufficient to establish the offense, because (a) no "attempt" had been proven as to him and/or his alleged agent-accessory, see 738 F.2d at 827, and (b) the proof was deficient that the natural gas used to heat the premises was in interstate commerce. (See Tr. 121-34.)

[4] Per the Seventh Circuit:

> "The South Union Street apartment building [object of the attempt arson] was one of four pieces of property that Russell owned and rented to tenants. Russell's income tax returns from 1976 through 1982 demonstrated that Russell treated these properties as income property for which he claimed business deductions for depreciation and expenses. These properties also were covered by business fire insurance policies . . . At the time of the incident in question, Russell lived in neither unit of the South Union Street property." 738 F.2d at 827.

[arguably][5] originating outside Illinois was used to heat the second floor apartment of the South Union Street property. (Tr. 119, 121-22)

Summary of Argument

The decision below—that residential property is encompassed within 18 U.S.C. 844(i)—conflicts with the Second Circuit's unequivocal position, as stated in *United States* v. *Mennuti*, 639 F.2d 107 (2 Cir. 1981), adhered to in *United States* v. *Barton*, 647 F.2d 224, 232 (2 Cir. 1981), that such property is not within the statute.[6]

The Seventh Circuit impermissibly has extended the statute beyond its intended scope, and erroneously and illogically purports to distinguish *Mennuti*, which is functionally indistinguishable from this case. Nor can the decision be

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[5] Petitioner challenged below the sufficiency of the evidence to establish that the natural gas was in interstate commerce. (See Tr. 121-34.) In this Court, petitioner concedes *arguendo* that a minimal amount of natural gas originating outside Illinois was used to heat the second floor apartment.

[6] In harmony with *Mennuti*, and thereby also conflicting with the instant decision, is the Tenth Circuit in *United States* v. *Monholland*, 607 F.2d 1311 (10 Cir. 1979). *Mennuti* squarely conflicts with the instant case, for both *Mennuti* and *Russell* involved purely residential property, while *Monholland*, which involved personal property (a truck), inferentially conflicts with *Russell*.

After the grant of certiorari herein, the Eighth Circuit decided *United States* v. *Hansen* (No. 84-1500) and *United States* v. *Terlecky* (No. 84-1501) in a consolidated opinion filed February 22, 1985, declining to "go as far as the Seventh Circuit [in *Russell*]." *Hansen* and *Terklecky*, *supra*, Slip Opinion (hereafter, Sl. Op.) at 4.

justified on grounds that interstate gas was used to heat the building—a ground expressly rejected in *Mennuti*.[7]

The District Court's (563 F.Supp. at 1088) and Seventh Circuit's (738 F.2d at 827) unprecedented position that the property was "business property" within the meaning of 18 U.S.C. 844(i) because petitioner treated it as "income property" for tax and insurance purposes cannot transform this residential property into "commercial" or "business" property. This position renders federal jurisdiction dependent upon a person's own characterization of his property—an illogical result obviously not intended by Congress.

Considering congressional intent and public policy, this Court should determine that the Second Circuit's position (per *Mennuti*) constitutes the correct interpretation of 18 U.S.C. 844(i). Accordingly, petitioner's conviction should be reversed, because the building, used only for residential purposes, does not fall within the ambit of the statute, properly construed.

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[7] In *Hansen* and *Terlecky*, fn. 6, *supra*, while finding federal jurisdiction because the 14-unit rental building rented largely to interstate transients, the Eighth Circuit expressly refused to ground jurisdiction on use of interstate utilities:

> "Because we resolve the jurisdictional question as we do, we need not consider the relevance of possible reliance by tenants on electric power which was transported interstate. We note however, that use of the origin of electricity to determine jurisdiction would seem to stretch the notion of interstate commerce beyond the limits of logic." *Id.*, Sl. Op. at 5, fn. 4.

ARGUMENT

Residential Property Does Not Fall Within the Ambit of the Statute. The Seventh Circuit's Decision to the Contrary—In Conflict With Decisions From Sister Circuits—Should Be Reversed.

Per the undisputed facts, (Stip., R. 30, p. 1), the property in issue was a two-flat residential building; at the time in question, the ground floor was vacant and a single family rented the second floor. (Tr. 98-100, 104-05) The District Court's determination[8] that there is federal jurisdiction nonetheless (R. 20, 34), affirmed on appeal, 738 F.2d at 827, conflicts with decisions from two different Circuits—the Second and Tenth. *United States* v. *Mennuti*, 639 F.2d 107 (2 Cir. 1981); *United States* v. *Monholland*, 607 F.2d 1311 (10 Cir. 1979). (See fn. 6, *supra*.) Moreover, the Eighth Circuit, in *United States* v. *Hansen and Terlecky*, Nos. 84-1500-01, ... F.2d ..... (February 22, 1985), expressly declined to "go as far as" the Seventh Circuit. (See fn. 7, *supra*, and pp. 7-8, 10-11, *infra*.)

Directly on point, *Mennuti*, *supra*, affirmed the District Court's dismissal of an indictment under sec. 844(i) where, as here, the alleged target of the explosives was a residential building.[9] Similarly, *Monholland*, *supra*, held that

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[8] The District Court twice so ruled—first, in denying petitioner's pre-trial motion to dismiss (motion, R. 17; order, R. 20, 23), printed at 563 F.Supp. 1085; and again in denying the motion for acquittal at the close of all the evidence. (R. 34)

[9] One of the two dwellings involved in *Mennuti* was used as rental property not occupied by the owner. *Mennuti*, *supra*, 639 F.2d at 109, n.1, par. 6. See also discussion at p. 14, *infra*.

this statute does not apply to a truck used within the State by a State judge travelling to and from work on interstate highways, though his work involved, *inter alia*, out-of-State litigants.

In only two cases other than at bar has rental-residential property been deemed subject to the statute—and both are distinguishable. In *United States* v. *Zabic*, 745 F.2d 464, 469-71 (7 Cir. 1984), "the building in issue is a 43-unit rental apartment building used exclusively for commercial purposes by its owner," *id.* at 469-70; the Seventh Circuit, expressly following *Russell*, respecting rental apartment property being "business property" and as to use of natural gas from outside Illinois, held that the building was used in an activity affecting commerce. A 43-unit apartment building is substantially different from a two-flat with a single occupied unit.

The building at issue in *United States* v. *Hansen and Terlecky*, cited in footnotes 6 & 7, pp. 4 & 5, *supra*, was a 14-unit building in North Dakota renting largely to interstate transients; the non-resident owner utilized a professional manager to keep up the property, arrange rentals, and insure the building, which was known as the Green Acres Apartment complex. (Sl. Op. at 3-4 & fn. 3.) In discussing the Seventh Circuit's position, the Eighth Circuit stated:

> "The Seventh Circuit has twice recently considered similar cases and affirmed the district court's acceptance of jurisdiction. In *United States* v. *Zabic*, 745 F.2d 464, 470-71 (7th Cir. 1984), that Court determined that a forty-three unit apartment building used exclusively for rental and income-producing purposes 'falls within the ambit of commercial "business property"' to which Congress alluded in fram-

ing section 844(i). In *United States* v. *Russell*, 738 F. 2d 825, 827 (7th Cir. 1984), the Court also determined that the statute included a two-unit apartment which the owner treated as income property." *Id.*, Sl. Op. at 4.

Finding the property was "a business property functioning in interstate commerce," *id.* at 5, the Eighth Circuit stated:

> "We need not go as far as the Seventh Circuit; in the case at bar, not only was the building income-producing rental property but in addition, interstate commerce is implicated in that the building rented to tenants who traveled interstate. Its tenants appear largely to have been transients, working for brief periods in the region's transportation and agricultural industries. The previous two building managers identified several of the tenants as construction workers employed on grain elevators and highways. One group of tenants were beekeepers who came from the southern states. Most of the transient tenants, though, appear to have been from Minnesota and South Dakota; most stayed in the building from a week to a few months. Thus, we conclude from these facts that the building was a business property functioning in interstate commerce. Accordingly, the prosecution was properly instituted in the district court under section 844(i)." *Id.*, Sl. Op. at 4-5.

There are no such facts implicating interstate commerce at bar.

Other than *Zabic* from the Seventh Circuit and *Hansen and Terlecky* from the Eighth—the only two cases other than *Russell* itself holding rental-residential property subject to sec. 844(i)—all other decisions finding the section

applicable involved unquestionably commercial property.[10] No case was discovered wherein purely residential property—as here—was deemed subject to the statute.[11]

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[10] In *United States* v. *Barton*, 647 F.2d 224, 232 & 232 n.8 (2 Cir. 1981) (gambling operations), and *United States* v. *Giordano*, 693 F.2d 245, 250 (2 Cir. 1982) (piano store), the Second Circuit distinguished and adhered to its prior *Mennuti* holding. In *United States* v. *Andrini*, 685 F.2d 1094, 1096 (9 Cir. 1982), the Ninth Circuit listed *Mennuti* and *Monholland*, *supra* note 6, as the only cases wherein Circuit Courts have not found §844(i) jurisdiction, "neither of which involved *commercial* property." (Emphasis in original.) The property held subject to the statute in *Andrini* was a commercial building under construction. See, *e.g.*, *United States* v *Nashawaty*, 571 F.2d 71 (1 Cir. 1978) (paint shop); *United States* v. *Sweet*, 548 F.2d 198, 202 (7 Cir. 1977) (tavern); *United States* v. *Schwanke*, 598 F.2d 575, 578 (10 Cir. 1979) (cafe); *United States* v. *Corbo*, 555 F.2d 1279, 1282 (5 Cir. 1977) (bookstore); *United States* v. *Keen*, 508 F.2d 986, 990 (9 Cir. 1974) (commercial fishing boat); *United States* v. *Belcher*, 577 F. Supp. 1241, 1242-44 (E.D. Va. 1983) (restaurant).

[11] *United States* v. *Fears*, 450 F.Supp. 249 (E.D. Tenn. 1978), relied on by the District Court, (R. 20, p. 5), did not involve sec. 844(i), but, rather, sec. 844(e), which prohibits *use of the telephone* to threaten to damage or destroy "any building" by explosives. Sec. 844(e)'s specification of "use of the . . . telephone . . . or other instrument of commerce" thus provides the interstate nexus via the means of conveying a threat or false information *re* harm to any individual or building; see 450 F.Supp. at 252, quoting from sec. 844(e). Thus, the *Fears* court's decision that sec. 844(e) includes residential property within the phrase "any building" is not determinative with respect to sec. 844(i)—the statute here in issue—which does not involve interstate commerce by virtue of use of a "telephone . . . or other instrument of commerce."

Moreover, the legislative history of sec. 844(e) does not include any indication that Congress did not intend "any building" to mean,

(footnote 11 continued)

Use Of Interstate Fuel Does Not Bring Residential Property Within The Statute's Scope.

The statute does not purport to include all buildings; it covers: "any building . . . used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce . . ." 18 U.S.C. 844(i). The legislative history of this section, as set out in *Mennuti, supra*, at 111, (more fully discussed at pp. 15-17, *infra*), clarifies that only business property is included:

> "Since the term affecting 'commerce' represents 'the fullest jurisdictional breadth constitutionally possible under the Commerce Clause,' . . . [citation omitted], this is a very broad provision covering substantially all *business* property." House Report, No. 91-1549, Organized Crime Control Act of 1970, at 69-70, reprinted in [1970] U.S.Code Cong. & Adm. News, p. 4007, at 4046. (Emphasis added.)

It is not enough that the building used such utilities as fuel or electricity from interstate commerce; the property must be business, not residential, property, for the statute to apply.

Most notably, the Eighth Circuit's recent refusal to "go as far as the Seventh Circuit" with respect to sec. 844(i), see pp. 7-8, *supra*,.. included an explicit criticism of

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(footnote 11 continued)
literally, any building, see 450 F.Supp. at 253, whereas the history of sec. 844(i) does contain material limiting the applicability of sec. 844(i) to business (as opposed to residential) property. See *Mennuti, supra*, 639 F.2d at 111-12, quoting from House Report No. 91-1549, and discussion of legislative history of sec. 844(i), pp. 15-17, *infra*.

Russell's interstate-utilities-nexus approach. In *United States* v. *Hansen and Terlecky, supra,* the Eighth Circuit determined federal jurisdiction obtained because "not only was the building income-producing rental property but in addition, interstate commerce is implicated in that the building rented to tenants [largely transients] who traveled interstate." *Id.*, sl. op. at 4. Thus concluding that the building came within sec. 844(i), the Eighth Circuit expressly disclaimed reliance on the "interstate utilities" factor on which *Russell* rests, stating:

> "Because we resolve the jurisdictional question as we do, we need not consider the relevance of possible reliance by tenants on electric power which was transported interstate. We note, however, that use of the origin of electricity to determine jurisdiction would seem to stretch the notion of interstate commerce beyond the limits of logic." *Id.*, Sl. Op. at 5, fn. 4.

Examination of cases construing and applying sec. 844(i) demonstrate that on the facts, courts apply a two-pronged test: is the building a commercial building, and is it used in, or in an activity affecting, commerce? Both these elements must exist on the facts to bring a particular building within the statute. And no case other than *Russell* hinges jurisdiction on use of an interstate utility in the building.[12]

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[12] For example in *United States* v. *Belcher*, 577 F.Supp. 1241 (E.D. Va. 1983), the District Court found federal jurisdiction under 18 U.S.C. 844(i) where the building was "a commercial building [restaurant] wherein out-of-State goods were sold . . ." *Id.* at 1245. The court held:

> "violation of § 844(i) minimally requires destruction of a commercial building wherein a business buys and sells goods passing in interstate commerce." *Ibid.*

(footnote 12 continued)

Each of the cases finding federal jurisdiction under the

(footnote 12 continued)

In *Barton*, *supra*, the Second Circuit found that consumption in the building of coffee and orange juice from out-of-State, and use of out-of-State fuel in heating the building, constituted "alternative jurisdictional predicates." 647 F.2d at 232-33.

In *Mennuti* itself, *supra*, 639 F.2d at 110, the Second Circuit expressly rejected the position adopted by the District Court herein, 563 F.Supp. at 1086, adhered to by the Seventh Circuit, 738 F.2d at 827. There, in response to the government's offer of proof —which included that "telephone lines, electric lines, and other services provided at . . . [the residence] traveled in interstate commerce and affected interstate commerce," 639 F.2d at 108-09, n.1, par. 5—the Second Circuit flatly rejected the argument that such proof establishes jurisdiction:

> "[A] residence is not used in interstate or foreign commerce simply because . . . it received electric power and telephone service from companies engaging in or affecting commerce . . ." *Id.* at 110.

Similarly, analyzing *Mennuti*, the Second Circuit in *Barton*, *supra*, noted that the statute "does not apply to private dwellings, notwithstanding several interstate contracts involving . . . fueling." 647 F.2d at 232 n.8.

Never before has the mere use of interstate fuel been the basis—as here—for finding federal jurisdiction in a residential, not a commercial building.

Several Second Circuit cases decided subsequent to *Mennuti* expressly have reaffirmed that decision, finding federal jurisdiction on their respective facts where commercial property was involved. In *United States* v. *Barton*, *supra*, decided a few months after *Mennuti*, the reviewing court found that the buildings in question (which housed gambling operations):

(footnote 12 continued)

statute involves property which was used commercially.[13]

Petitioner's Treatment Of The Property Is Not Determinative.

The Seventh Circuit's position, 738 F.2d at 827, adopting that of the District Court, 563 F.Supp. at 1088, characterizing the property as business or commercial property be-

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(footnote 12 continued)

". . . were used in activities affecting interstate commerce within the meaning of §844(i). There was ample evidence that the buildings were used for commercial activities." 647 F.2d at 232.

The Court of Appeals noted:

"This [*i.e.*, that the buildings were used for commercial activities] distinguishes our recent decision in . . . [*Mennuti*], in which we held that §844(i) does not apply to private dwellings, notwithstanding several interstate contacts involving financing, insurance, fueling, and use of building materials." *Id.* at 232 n.8.

And in *United States* v. *Giordano*, 693 F.2d 245 (2 Cir. 1982), the Second Circuit held a piano store fell within the ambit of the statute. Specifically holding that this decision was consistent with *Mennuti*, the Court of Appeals stated:

"*Mennuti* held that only commercial enterprises are covered by the statute; there is no claim here [*i.e.*, in *Giordano*] that defendants conspired to destroy a residential building as in *Mennuti*." 693 F.2d at 250.

In *United States* v. *Andrini*, 685 F.2d 1094 (9 Cir. 1982), the property held to be subject to the statute was a commercial building under construction. In the course of its opinion, the Court stated:

"We have discovered only two cases in which circuit courts have not found §844(i) jurisdiction, neither of which involved *commercial* property." [Citing *Mennuti* and *Monholland*, *supra*.] *Id.* at 1096. (Emphasis in original.)

[13] See cases cited in fn. 10, p. 9, *supra*. The only arguable exceptions, *Zabic*, *supra*, and *Hansen and Terlecky*, *supra*, are distinguished and discussed at pp. 7-8, *supra*.

cause petitioner treated it as income property, confuses the quality of the property with the characterization of petitioner. No authority has been advanced in support of this novel position, that the manner in which a person treats property—despite the objective facts—can bring federal jurisdiction into play. Petitioner's conviction should not be permitted to stand on the basis of unfounded theory. Considering the objective facts, the property here was purely residential.[14] As such, it is not covered by the statute.

This Case is Functionally Indistinguishable From Mennuti; Russell Brings The Seventh Circuit Into Conflict With The Second.

The facts in *Mennuti* itself included that one of the two dwellings involved was rental property not occupied by the owner. 639 F.2d at 109, n.1, par. 6. Thus, the Seventh Circuit's purported distinction between *Russell* and *Mennuti*, on the basis that, "At the time of the incident in question, Russell lived in neither unit of the . . . property," 738 F.2d at 827, is revealed as spurious.

Both in deciding that on the facts, the building in this case is not "purely residential" as was the building in *Mennuti*, and in adopting the position that use of interstate natural gas to heat the building is grounds for federal jurisdiction, the *Russell* opinion directly conflicts with *Mennuti*—despite the Seventh Circuit's self-serving disavowal, 738 F.2d at 827, that any conflict exists.

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[14] That one of the building's two units in *Russell* was occupied by a tenant cannot serve to distinguish this case from *Mennuti*, which also involved a rental unit. 639 F.2d at 109 n.1, par. 6, discussed in the text which follows.

Congressional Intent.

The legislative history of sec. 844(i) contains the telling language:

> "[T]his is a very broad provison covering substantially all business property." [1970] U.S. Code Cong. & Adm. News 4007, at 4046, House Report No. 91-1549, Organized Crime Control Act of 1970, at 69-70, quoted in *Mennuti*, *supra*, 639 F.2d at 111.

Based on this language and on other statements in this House Report, *id.* at 111, the Second Circuit in *Mennuti* decided that the "business property" of which the House Judiciary Committee spoke in describing sec. 844(i) excluded dwellings:

> "The [congressional] report [cited above] could not be clearer when it speaks of 'business' property. That phrase refers directly to the type of conduct punished by the statute [18 U.S.C. 844(i)], namely, the damage or destruction by explosion of business property *used* in interstate or foreign commerce or in an activity affecting such commerce, not to dwelling houses which were not being used for any commercial purpose at all." *Mennuti*, *supra*, 639 F.2d at 111-12. (Emphasis in original.)

Additional language from that same Report further supports petitioner's position. Discussing Title XI of the Organized Crime Control Act of 1970, which includes 18 U.S.C. 844(i), the House Judiciary Committee (which drafted the Act) states:

> "[I]t is not the intention of the proposed statute that the Federal Government substitute for the enforcement activities of State and local authorities. Express provision is made that this statute shall not be construed as preempting State law or depriving State or local law enforcement of its responsibilities for investigating

> and prosecuting crimes involving the use of explosives." House Report No. 91-1549, *supra*, at 39.

Thus, the statute's drafters envisioned that not every arson would be a federal offense—the very conclusion reached by the Second Circuit. See *Mennuti*, *supra*, 639 F.2d at 111-13. Indeed:

> "The legislative history quoted above does not afford the slightest indication that Congress intended to punish all arson schemes." *Id.* at 113 n.4.

As stated in *Mennuti*, construing sec. 844(i) as written:

> "It [Congress] chose to require that the damaged or destroyed property must itself have been used in commerce or in an activity affecting commerce." *Id.* at 110.

Statutory Construction—Public Policy.

Mennuti does not hold, nor does petitioner contend, that Congress could not have drafted a statute encompassing virtually every building in the land, had it chosen so to do. Thus, this case does not present a constitutional challenge to congressional power under the Commerce Clause.[15] It is our contention that, as held in *Mennuti*, the statute that Congress did pass, 18 U.S.C. 844(i), as explicated by the House Judiciary Committee Report referred to above, does not cover a building used as a dwelling by a tenant of the owner, even though interstate utilities may have been used in the building. [For a comprehensive,

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[15] And thus, *Garcia* v. *San Antonio Metropolitan Transit Authority, et. al.*, No. 82-1913, ____ U.S. ____, 45 CCH S. Ct. Bull. at B976, decided February 19, 1985, does not affect the instant issue, for while *Garcia* approved a Department of Labor, Wage and Hour Administration opinion expanding the scope of the Fair Labor Standards Act so as to cover certain municipal employees previously deemed exempt, this decision involves Congress' constitutional power, not—as at bar—the coverage of a statute, the constitutionality of which is not in issue.

cogent discussion of this Court's historical interpretation of the Commerce Clause, see *Mennuti, supra*, 639 F.2d at 110-11.]

As pointed out by Judge Friendly in *Mennuti*:

> "'[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes." *Id.* at 113, quoting from *United States* v. *Bass*, 404 U.S. 336, 349, 30 L.Ed.2d 488, 497 (1971).

The principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," *Rewis* v. *United States*, 401 U.S. 808, 812, 28 L.Ed.2d 493, 497 (1971), is also persuasive.

* * *

To adopt the Seventh Circuit's position, instead of that of the Second, will mean that just about the only building not covered by sec. 844(i) is an outhouse—and one without electricity or gas, at that; and would the use therein of toilet tissue manufactured from paper made from out-of-state trees bring even such a structure within the statute?

* * *

Considering all the foregoing—including the legislative history as noted above—this Court should establish and confirm, as the law of the land, the principle set forth by Judge Friendly[16] in his well-reasoned *Mennuti* opinion, speaking for the Second Circuit:

> "We are not holding that Congress could not, with appropriate findings and language, make it a federal

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[16] Judge Friendly's authority in the area of statutory construction is recognized by writers in that field. See, *e.g.*, Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 813-16 (1983), by Judge Richard A. Posner of the Seventh Circuit, who was not on the panel that decided *Russell*.

> crime to do what appellees were charged with doing here. We hold only that Congress did not choose, as the Government contends, to make nearly every bombing in the country a federal offense; it limited its reach to property currently used in commerce or in an activity affecting it, leaving other cases to enforcement by the states." *Mennuti, supra*, 639 F.2d at 113.

Accordingly, this Court should resolve the clear conflict between the Circuits created by the *Russell* decision by adopting the position of the Second Circuit as the proper interpretation of the statute, 18 U.S.C. 844(i). Under this reading of the statute, petitioner's conduct is without the reach of federal jurisdiction under sec. 844(i).

CONCLUSION

For the foregoing reasons, petitioner's conviction should be reversed, because the building at issue is not within the scope of 18 U.S.C. sec. 844(i), properly construed.

Respectfully submitted,

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March 1, 1985

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No. 84-435

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT RUSSELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Congress intended 18 U.S.C. 844(i), which prohibits the destruction by fire of "any building * * * used in * * * any activity affecting interstate or foreign commerce," to apply to insurance fraud arson of rental property heated by gas that moved in interstate commerce.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 738 F.2d 825. The opinion of the district court is reported at 563 F. Supp. 1085.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1984. A petition for rehearing was denied on July 25, 1984. The petition for a writ of certiorari was filed on September 17, 1984, and was granted on February 19, 1985. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 844(i) provides:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

STATEMENT

Following a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of attempting to destroy by fire a two-unit apartment building, in violation of 18 U.S.C. 844(i). He was sentenced to ten years' imprisonment. The court of appeals affirmed (Pet. App. 4a).

1. Petitioner, a member of the Chicago Fire Department, owned four buildings, including a two-unit apartment building at 4530 South Union Street in Chicago. The building was heated by gas that had moved in interstate commerce. Petitioner earned rental income from the building and treated it as a business property for tax purposes, claiming deductions for depreciation and expenses. His buildings were covered by business insurance policies; Allstate Insurance Company insured the building on South

Union Street for $40,000. Tr. 150-155; Stip. 11; Exh. 17.[1]

In February 1983, the second floor unit of appellant's building on South Union Street was occupied by a family of eight. The first floor unit had also been rented, but the occupant stayed there only periodically. Petitioner needed to make repairs to the building to avoid fines for housing code violations. He decided to destroy the building and obtain the insurance proceeds rather than make the needed repairs. Tr. 50, 98-102; Exh. 1.

Petitioner hired Ralph Branch, who had recently been released from prison, to set fire to the building. He showed Branch how to start the fire by using a natural gas line in the basement. When Branch asked petitioner how his tenants would escape the fire, petitioner replied, "if they do they do, if they don't, they don't." In order to provide petitioner with an alibi, the arson attempt was scheduled for the evening of February 8, 1983, when petitioner was on duty at the fire station. The attempt failed, however. Petitioner asked Branch to try again on February 10, using gasoline. But Branch then reported the planned arson to the FBI and agreed to tape record a telephone conversation with petitioner. During the conversation, petitioner asked Branch if he was going to start the fire that evening, Branch assured petitioner that he would, and petitioner told Branch where he had placed a can of gasoline. Petitioner was arrested following the conversation, and the fire was never set. Tr. 31-50.

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[1] The transcript of the trial, which is on file with the Court, refers to Stip. 11, at 153-154. Stipulation 11, which will be printed in the Joint Appendix, states that the building on South Union Street was insured by Allstate.

2. Prior to trial, petitioner moved to dismiss, claiming that the indictment failed to allege a crime under Section 844(i). In particular, petitioner claimed that that Section 844(i) does not apply because the building he attempted to destroy was not "used in * * * any activity affecting interstate or foreign commerce." Relying on the Second Circuit's decision in *United States* v. *Mennuti*, 639 F.2d 107 (1981), petitioner claimed that Section 844(i) does not reach destruction of residences.

The district court rejected this argument, for two reasons. First, numerous courts had given Section 844(i) a broad reading in light of its proscription of the destruction of "any building." The Second Circuit itself, subsequent to *Mennuti*, had approved a jury instruction stating that "[a] building is used * * * in an activity [a]ffecting interstate commerce * * * if oil or gas moving in interstate commerce is used to heat the building" (563 F. Supp. at 1087, citing *United States* v. *Barton*, 647 F.2d 224, 231-232 (2d Cir.), cert. denied, 454 U.S. 857 (1981)). The court found that the gas used to heat the building petitioner attempted to destroy had moved in interstate commerce and that this brought petitioner's offense within the reach of Section 844(i) (563 F. Supp. at 1086-1087).[2]

Alternatively, the district court held that petitioner's offense was covered by Section 844(i) because the property he attempted to destroy was "business property." The district court noted that the Second Cir-

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[2] At the conclusion of the trial, petitioner moved for a verdict of acquittal, alleging that the gas used to heat the building was manufactured solely within Illinois. The district court rejected this argument, and petitioner now concedes that the gas used to heat the building moved in interstate commerce (Br. 4 n.5).

cuit in *Mennuti* had based its ruling that Section 844 (i) does not reach residential property on a statement in the House report describing Section 844(i) as "a very broad provision covering substantially all business property" (H.R. Rep. 91-1549, 91st Cong., 2d Sess. 70 (1970)). From petitioner's perspective, the district court held, the building was business property since it was used in "his 'side' business of providing housing space for rent" (563 F. Supp. at 1088 (footnote omitted)).

3. The court of appeals affirmed petitioner's conviction. Relying on its prior decision in *United States* v. *Sweet*, 548 F.2d 198 (7th Cir.), cert. denied, 430 U.S. 969 (1977), it held that any activity having an effect on interstate commerce, even a de minimis effect, brings a building within the reach of Section 844(i). The court did not rely on the district court's finding that the building petitioner attempted to destroy was heated by fuel that moved interstate. Instead it relied on the district court's alternative conclusion that the building was "business property." [3]

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[3] The court stated (Pet. App. 3a):

> The South Union Street apartment building was one of four pieces of property that Russell owned and rented to tenants. Russell's income tax returns from 1976 through 1982 demonstrated that Russell treated these properties as income property for which he claimed business deductions for depreciation and expenses. These properties also were covered by business fire insurance policies, in contrast to the defendant's own residence which he covered by a homeowner's policy limited to owner-occupied premises. At the time of the incident in question, Russell lived in neither unit of the South Union Street property. The district court's jurisdiction thus could be based on the fact that this property was business or commercial property under Section 844(i), and we affirm the court's jurisdiction on this basis.

SUMMARY OF ARGUMENT

Section 844(i) broadly prohibits the destruction by fire of "any building * * * used in * * * any activity affecting interstate or foreign commerce." By this language, Congress intended to exercise its commerce power to the fullest extent and to protect nearly all types of property. The legislative history of the Section 844(i) makes this unmistakably clear.

Petitioner concedes that Congress has power under the Commerce Clause to prohibit arson of the sort he attempted. Relying on *United States* v. *Mennuti*, 639 F.2d 107 (2d Cir. 1981), petitioner argues that Congress did not intend to exercise its commerce power fully in enacting Section 844(i), but intended to cover "business property" only. This argument is wrong for three reasons. First, Congress in 1970 specifically rejected the restriction on Section 844(i)'s coverage that petitioner advocates. Second, examination of Section 844(e) confirms that Congress did not intend to distinguish residential property from business property. Third, the statement in the legislative history on which petitioner primarily relies is not inconsistent with the conclusion that Congress exercised its commerce power fully.

Viewed according to this Court's rulings on the scope of the commerce power, the building petitioner attempted to destroy was "used in * * * [an] activity affecting interstate commerce" in three ways. The building was heated by gas that moved in interstate commerce, it was used for rental purposes, and petitioner attempted to use it to defraud an insurance company.

On its face, Section 844(i) provides for broad coverage. Since this comports with clear congressional intent, the rule of lenity does not apply. Nor does

this case present a problem of federal-state relations, since Congress has not preempted the states, but has provided an additional weapon for use against arsonists, and state and local officials have supported federal involvement in this area.

ARGUMENT

I. CONGRESS INTENDED TO EXERCISE ITS COMMERCE CLAUSE POWER FULLY UNDER SECTION 844(i) AND DID NOT INTEND TO ESTABLISH A "BUSINESS PROPERTY" LIMITATION

Petitioner concedes that Congress has the power, under the Commerce Clause, to enact an arson statute "encompassing virtually every building in the land" (Br. 16). The Second Circuit, on which petitioner relied, also assumed that Congress, acting under its commerce power, could prohibit arson of all types (*Mennuti*, 639 F.2d at 110). This concession is correct. See *Perez* v. *United States*, 402 U.S. 146 (1971); pp. 14-15, *infra*.[4] Thus, it is essential to petitioner's argument that he show that Congress did not intend to exercise its commerce power fully. But the language of Section 844(i), the structure of the statute of which it is a part, and its legislative history show that Congress intended to exercise its power fully. Moreover, the legislative history of the statute and its structure specifically show that Congress did not intend to adopt the limitation petitioner proposes.

1. The starting point for any question of statutory construction is the language of the statute. If the

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[4] See also Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 Ariz. L. Rev. 271 (1973); Bogen, *The Hunting of the Shark: An Inquiry into the Limits of Congressional Power under the Commerce Clause*, 8 Wake Forest L. Rev. 187 (1972).

"terms of a statute [are] unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances' " (*Garcia* v. *United States*, No. 83-6061 (Dec. 10, 1984), slip op. 5, quoting *TVA* v. *Hill*, 437 U.S. 153, 187 n.33 (1978)).[5] Section 844(i) broadly prohibits the destruction, by means of fire or an explosive, of "any building * * * used in * * * any activity affecting interstate or foreign commerce." In ordinary usage, the phrase "any building" includes residential buildings.[6] Hence, the plain meaning of Section 844(i) includes buildings of the sort petitioner attempted to destroy.[7] The phrase "used in * * * any activity affecting interstate or foreign commerce" signifies Congress's intention to assert its full power under the Commerce Clause. See *Scarborough* v. *United States*, 431 U.S. 563, 571-572 (1977); *National Labor Relations Board* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963).[8] Nothing on the

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[5] See also *Russello* v. *United States*, No. 82-472 (Nov. 1, 1983), slip op. 4; *United States* v. *Turkette*, 452 U.S. 576, 580 (1981).

[6] The "ordinary * * * common meaning" (*Perrin* v. *United States*, 444 U.S. 37, 42 (1979)) of "building" is a "constructed edifice designed to stand more or less permanently * * * and serving as a dwelling." *Webster's Third New International Dictionary* 292 (1981).

[7] Compare *United States* v. *Fears*, 450 F. Supp. 249 (E.D. Tenn. 1979) ("any building" in 18 U.S.C. 844(e) means "any building," including residences).

[8] In *Scarborough*, which involved the construction of a criminal statute prohibiting possession of a firearm "in or affecting commerce" by a felon (see n.15, *infra*), the Court stated: "As we have previously observed, Congress is aware of the 'distinction between legislation limited to activities "in commerce" and an assertion of its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce' " (431 U.S. at 571 (citation omitted)).

face of Section 844(i) suggests a congressional intent to limit its coverage. Indeed, Congress, by adopting "affecting commerce" language, indicated that it intended to cover any building reachable through the full exercise of its commerce power.

The legislative history confirms this straightforward reading of Section 844(i). The 1970 House committee report accompanying the bill specifically cited *Reliance Fuel Corporation* for this very point. It stated that by using the term "affecting [interstate or foreign] 'commerce,'" Congress intended to exercise " 'the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause,' *NLRB* v. *Reliance Fuel Corp.*" (H.R. Rep. 91-1549, 91st Cong., 2d Sess. 70 (1970)). Representative McCullough, who introduced the bill containing Section 844(i), stated on the floor of Congress that the provision extended "to the full extent of our constitutional power" (116 Cong. Rec. 35198 (1970)).[9] Congress rarely states its intention so clearly. It intended to exercise its commerce power fully through Section 844(i).

2. Despite the broad language of the statute and the clear statements in the legislative history, petitioner contends that Congress did not intend to exercise its commerce power fully. Petitioner's argument is based on a statement in the House Report, immediately following the statement that Section 844(i) represents " 'the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause,' " which describes Section 844(i) as "a very broad provision covering substantially all business property"

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[9] See also 116 Cong. Rec. 37187 (1970) (remarks of Rep. MacGregor) ("Nearly all types of property will now be protected.").

(H.R. Rep. 91-1549, *supra*, at 69-70). The Second Circuit (*Mennuti*, 639 F.2d at 111), like petitioner (Pet. 10), stressed that statement in concluding that Section 844(i) does not represent the full exercise of Congress's commerce power but is limited to the destruction of "business property." [10] Thus, petitioner in effect argues that "any building" should be read as "any business property." This Court has consistently rejected similar attempts to limit a statutory term that is preceded by the word "any." [11] It should likewise reject petitioner's attempt to limit "any building" to "any business property," for three reasons.

First, and most important, the House Committee, after holding hearings on the bill containing Section 844(i), specifically deleted the very limitation on Section 844(i)'s reach that petitioner proposes. As originally proposed, Section 844(i) prohibited the destruction of "any building * * * *used for business purposes* by a person engaged in commerce or in any activity affecting commerce" (emphasis supplied). During congressional hearings on the proposed legis-

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[10] The Second Circuit stressed Congress's use of the verb "used" in Section 844(i) (639 F.2d at 110) as well as the "business property" phrase in the legislative history. The use of the verb "used" does nothing more than require that some connection be made between the building and an effect on interstate commerce; that connection may be indirect and of small magnitude (see pp. 14-15, *infra*).

[11] See *Garcia* v. *United States*, *supra* ("any money or other property of the United States" in 18 U.S.C. 2114 is not limited to "postal" money); *United States* v. *Turkette*, *supra* ("any enterprise" in 18 U.S.C. 1962(c) is not limited to "legitimate" enterprises); *Russello* v. *United States*, *supra* ("any interest" in 18 U.S.C. 1963(a)(1) is not limited to interests in an enterprise).

lation, representatives from the Department of Justice said that the provision was intended to reach business property only and that a businessman's home would be excluded from the provision. *Explosives Control: Hearings on H.R. 17154, H.R. 16699, H.R. 18573 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 73-74 (1970) (testimony of Will Wilson, Assistant Attorney General, and Michael Abbell, Attorney) [hereinafter cited as *1970 Hearings*]. Several witnesses testified that a limitation of coverage to business property was too restrictive because terrorists had recently bombed schools, police stations, and churches, buildings that might not be considered "business property," and urged the subcommittee to delete the term "used for business purposes" from the proposed legislation. Representative Goldwater stated that the bill should "cover churches, schools, and real or other property" (*id.* at 289). Representative Wylie stated that the provision should be broadened to cover "a private dwelling or a church or other property not used for business" (*id.* at 300). See also *1970 Hearings* 78-79 (statement of Rep. Neal Smith). Members of the subcommittee and its counsel recognized that the provision could be broadened by deleting "business purposes" from the proposed legislation (*id.* at 73-74).

The subcommittee deleted the phrase and Congress enacted Section 844(i) without it.[12] This deletion

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[12] It is noteworthy that the Second Circuit, in developing the "business property" requirement in *Mennuti*, was apparently unaware that Congress had deleted such a requirement from the text of Section 844(i). This undercuts the conclusions the court drew about congressional intent based on its scrutiny of the words of the statute.

led Representative McCullough, who introduced the bill that included the provision that became Section 844(i), to state that "the committee extended the provision protecting interstate and foreign commerce * * * to the full extent of our constitutional power" (116 Cong. Rec. 35198 (1970)). Since Congress specifically deleted a "business purpose" limitation from the words of the statute, such a limitation cannot be reimposed by the phrase in the House report.[13]

Second, the structure of Section 844 further confirms that Congress did not intend to limit its coverage to business property. Section 844(e) prohibits threats to destroy "any building" if made "through the use of the mail, telephone, telegraph, or other instrument of commerce." The provision contains no requirement that the threatened building be used in an activity affecting commerce. Thus, it is clear that a threat to burn any building, including a residence, is covered by Section 844(e), if the threat is made through the mail or over the telephone. *United States* v. *Fears*, *supra*. There is no reason why Congress would want to prohibit a threat to burn a building but not cover the actual burning of the same building. Rather, it is apparent that Congress intended both subsections to reach as broadly as the Commerce Clause would permit. The phrase

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[13] The likely origin of the phrase in the House report on which petitioner relies also shows that it is not entitled to weight. It appears to have been reproduced almost verbatim from the statement of the Justice Department officials describing the proposed bill before the business property phrase was deleted. See *1970 Hearings* 37. Thus, the phrase in the Report appears to be a mere inadvertence, describing a prior version of the bill.

"through the use of the mail, telephone, telegraph, or other instrument of commerce" in Section 844(e) and "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce" in Section 844(i) indicate that Congress was relying on its commerce power and intended to reach as far as that power extends.[14]

Third, the statement in the House report that Section 844(i) covers "substantially all business property" is not inconsistent with the statement it follows, that the section represents Congress's full exercise of its commerce power. The statement may be regarded as providing an important example of property that Section 844(i) covers. As the district court recognized, the "specific mention of 'business property' does not necessarily carry with it the negative pregnant that all other property falls beyond the statute's reach" (563 F. Supp. at 1088 n.2).

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[14] One Congressman, Representative Celler, seemed to think that Congress lacked power to prohibit the destruction of residential property. He stated that "the mere bombing of a private home even under this bill would not be covered" (116 Cong. Rec. 35359 (1970) (remarks of Rep. Celler)). He explained that the bill reached only property controlled, owned, or financed by the federal government (*ibid.*). This statement is clearly incorrect. While Section 844(f) reaches federal property, Section 844(i) reaches property in or affecting interstate or foreign commerce. Representative Celler may have been thinking of his own proposed legislation to prohibit bombings—which did not contain any provision comparable to Section 844(i) (see *1970 Hearings* 21-23)—when he stated that the bill reached only federal property and not residences. Since the plain meaning and legislative history refute Representative Celler's statement, it should be given no weight. *Garcia* v. *United States*, No. 83-6061 (Dec. 10, 1984), slip op. 6, 8; *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

II. PETITIONER USED THE BUILDING IN ACTIVITIES AFFECTING INTERSTATE COMMERCE

Congress's power under the Commerce Clause is exceedingly broad. Chief Justice Marshall recognized for the Court, in *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824), that Congress possesses plenary power to regulate any activity having an effect on interstate commerce. That principle was firmly established in *Wickard* v. *Filburn*, 317 U.S. 111 (1942), where the Court held that wheat grown and consumed on the same farm nevertheless affected interstate commerce, although the effect was indirect. The Court there pointed out that while the "appellee's own contribution to the demand for wheat may be trivial by itself, * * * his contribution, taken together with that of others similarly situated, is far from trivial." *Id.* at 127-128. Civil Rights Act cases reaffirmed that Congress may regulate activities affecting interstate commerce, even though the substantiality of the effect on interstate commerce becomes apparent only in the aggregate. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964). These cases were all relied upon in *Perez* v. *United States*, 402 U.S. 146 (1971), which made clear that the same principles apply when Congress exercises its commerce power in a criminal law context (see Stern, *The Commerce Clause Revisited—The Federalization of Interstate Crime*, 15 Ariz. L. Rev. 271 (1973); L. Tribe, *American Constitutional Law* 236-237 (1978)).

Under these principles, the government must show only a minimal connection between interstate commerce and the "use" of the particular building that is within the regulated class. See *Perez*, 402 U.S. at

154. Accordingly, in *Scarborough* v. *United States*, 431 U.S. 563 (1977), the Court considered the language of 18 U.S.C. App. 1202(a), which prohibits a felon from possessing a firearm "in commerce or affecting commerce." [15] The Court concluded that some connection between the possession and interstate commerce was required by the statute, but, in light of Congress's use of "affecting commerce," only a minimal connection—"Congress sought to reach possessions broadly, with little concern for when the nexus with commerce occurred. * * * [T]here is no question that Congress intended no more than a minimal nexus requirement" (431 U.S. at 577).[16] The Court frankly noted that "Congress was not particularly concerned with the impact on commerce except as a means to insure the constitutionality of" the firearms statute (*id.* at 575 n.11). The same is true here, as the 1970 legislative history clearly shows.

Petitioner used his building on South Union Street in an activity affecting interstate commerce by heating it with gas that moved interstate. If the building had been destroyed, that would have affected the amount of gas shipped in interstate commerce. The effect might have been minimal in the individual instance,[17] but that is all that is required when Con-

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[15] Section 1202(a) provides: "Any person who * * * has been convicted * * * of a felony * * * who receives, possesses, or transports in commerce or affecting commerce, * * * any firearm" may be fined and imprisoned.

[16] The holding in *Scarborough* was that Section 1202(a) prohibits possession of firearms by felons where the firearm was obtained prior to the felony conviction.

[17] The gas bill for the second-floor unit of petitioner's building was $103.62 for the month prior to petitioner's attempt to destroy it. Tr. 113-116.

gress is exercising its commerce power fully, over a class of cases.

The courts of appeals have recognized that Section 844(i) reaches buildings having similar effects on interstate commerce. In *United States* v. *Barton*, 647 F.2d 224, 232 (2d Cir. 1981), the court found that Section 844(i) covered the burning of a building that was heated by out-of-state fuel. In *United States* v. *Andrini*, 685 F.2d 1094, 1096 (9th Cir. 1982), the court held that Section 844(i) covered the burning of an office building that was under construction because it was being constructed from out-of-state materials. While the building in *Barton* was not a residence, and the building under construction in *Andrini* was going to house commercial enterprises, the particular ties between the buildings and interstate commerce had nothing to do with their business uses. There is no reason why the use of out-of-state fuel to heat a building used for gambling purposes, as in *Barton*, connected the building to interstate commerce any more than it ties petitioner's building to interstate commerce. Similarly, if the use of out-of-state construction materials connects a building with interstate commerce, as in *Andrini*, it does not matter that the building will be an office building rather than a residence when it is completed. As the district court here concluded, the use of out-of-state gas to heat the building petitioner attempted to burn established that it was used in an activity affecting interstate commerce.[18]

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[18] As the Second Circuit noted (*Mennuti*, 639 F.2d at 112), if the use of gas moving in interstate commerce to heat a residence establishes a sufficient connection with interstate commerce to satisfy the jurisdictional requirement of Section 844(i), then the use of gasoline moving in interstate com-

The building petitioner attempted to destroy was also used in an activity affecting interstate commerce because he rented it. Renting the property had two effects on commerce—one resulting from the commercial nature of the rental business and the other resulting from its effect on the movement of people. Petitioner's rental business affected commerce because he obtained income from his buildings and deducted expenses attributable to them. His income and expenses affected commerce just as the income and expenses of any other business does. In addition, this Court has held that the sale of residential property may have an effect on interstate commerce under the antitrust laws because of its effect on "the interstate movement of people" (*McLain* v. *Real Estate Board*, 444 U.S. 232, 245 (1980)). The renting of residential units—viewed, again, in the aggregate of the entire class of cases—affects both interstate and intrastate movement of people, and hence affects commerce.

The courts of appeals have, accordingly, concluded that rental property is within the scope of Section 844(i). The Eighth Circuit, in *United States* v. *Hansen*, No. 84-1500 (Feb. 22, 1985), slip op. 4, held that a 14-unit apartment building was covered by Section 844(i), both because it was "income-producing rental property" and because it was "rented to tenants who moved interstate." Similarly, in *United States* v. *Zabic*, 745 F.2d 464, 470-471 (7th Cir. 1984), the court held that a 43-unit apartment build-

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merce as fuel for a truck should establish a sufficient connection as well. This would lead to a different result from that reached in *United States* v. *Monholland*, 607 F.2d 1311 (10th Cir. 1979).

ing was within the coverage of Section 844(i). Similarly here, as the court of appeals and the district court concluded, petitioner rented the building he attempted to destroy and this use affected interstate commerce. Although the effect of his particular building on the movement of people would be less substantial than the effect of a larger building, like the 43-unit building in *Zabic*, or a building that rented to transients, as in *Hansen*, the difference is a matter of degree. Similarly, while the income and expenses generated from his building would likely be smaller than that produced by larger buildings, that also is a matter of degree. Petitioner's building nevertheless is within the class whose cumulative effect on interstate commerce [19] made it an appropriate subject for Congress's exercise of the commerce power.

Petitioner also used his building in an activity affecting interstate commerce when he attempted to destroy it to defraud an insurance company. The hearing on the bill that amended Section 844(i) in 1982—by adding the words "or fire" to clarify that the section covered all means of arson as well as bombing—showed a focused congressional concern on insurance fraud.[20] A representative of the insurance

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[19] See p. 19 & n.21, *infra*.

[20] The amendment was intended primarily to make clear that Congress disapproved the result in *United States* v. *Gere*, 662 F.2d 1291 (9th Cir. 1981), which had held, contrary to the view that three other circuits had adopted, that the destruction of a building by the use of gasoline was not covered by Section 844(i). See, *e.g.*, H.R. Rep. 97-678, 97th Cong., 2d Sess. 2 & nn. 5 & 6 (1982); *Anti-Arson Act of 1982: Hearings on H.R. 6377 and H.R. 6454 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 11 (1982) [hereinafter cited as *1982 Hearing*]. The

industry testified in support of the bill because "the insurance industry * * * is concerned and alarmed by the escalation of arson fraud schemes" (*Anti-Arson Act of 1982: Hearing on H.R. 6377 and H.R. 6454 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 39 (1982) [hereinafter cited as *1982 Hearing*]). He presented a report which showed that insurance fraud was a motive in approximately twelve percent of commercial arson fires and fourteen percent of residential arson fires (*id.* at 69),[21] resulting in millions of dollars in losses to the insurance industry. Congress was advised that insurance industry representatives estimated that the Bureau of Alcohol, Tobacco and Firearms' "arson program saved over $54 million in false claims in 1980" (128 Cong. Rec. H4958 (daily ed. Aug. 2, 1982)). The chairman of the House Committee holding the hearings assumed that the amended Section 844(i) would cover arson fraud, as did others at the hearings.[22] Thus, petition-

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House report provided that the "jurisdictional circumstances enumerated [in Section 844] otherwise remain unchanged" (H.R. Rep. 97-678, *supra*, at 1).

[21] Other motives for arson include vandalism, revenge, concealment of other crimes, and pyromania (*1982 Hearing* 69). Congressman McClory noted that in 1979 alone fires accounted for $1.3 billion in direct damages. He added that "[a]rson causes approximately 1,000 deaths each year * * * and many arson incidents involve organized crime." 128 Cong. Rec. H4958 (daily ed. Aug. 2, 1982).

[22] The chairman asked Treasury Department enforcement officials whether federal jurisdiction over arson "ought to be *limited* to those that involve schemes to fraudulently obtain insurance proceeds" (*1982 Hearing* 36 (emphasis added)). The enforcement officials responded that Section 844 should not be limited in that way (*1982 Hearing* 36-38).

er's motive in attempting to destroy the building to obtain insurance proceeds establishes a direct connection with interstate commerce.[23]

In sum, the record establishes three ties between the use of petitioner's building and interstate commerce. Since Congress intended to exercise its commerce power fully, each of those connections satisfies the jurisdictional requirement of Section 844(i).

III. THE RULE OF LENITY DOES NOT APPLY AND FEDERALISM PROBLEMS ARE NOT PRESENTED IN THIS CASE

Petitioner makes two arguments (Br. 16-18) based on the allegation that Section 844(i) is ambiguous. The first is that, under the rule of lenity, ambiguous statutes should be narrowly construed. Second, because Section 844(i) criminalizes behavior that is also punished by the states, petitioner contends that it should be construed narrowly, under *United States* v. *Bass*, 404 U.S. 336 (1971). Petitioner suggests that the proper narrow construction resulting from the application of lenity or federalism concerns is the

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[23] The courts of appeals other than the Second Circuit have not addressed the question whether insurance fraud arson necessarily affects interstate commerce. That court in *Mennuti* rejected this argument, stating that "we deem it inconceivable that Congress was thinking of the business of arson" when it enacted Section 844(i) (639 F.2d at 113). That case, as well as *Barton*, which expressed doubt about whether "the mere fact that a building is insured" establishes a tie to interstate commerce (647 F.2d at 232), was decided prior to the 1982 amendment of Section 844. As indicated, the hearing on that bill showed a focused congressional concern on arson to defraud insurance companies. The statistical evidence presented by the insurance industry at the hearings provides a firm basis for the conclusion that insurance fraud arson has a substantial impact on interstate commerce.

exclusion of residential property from Section 844 (i)'s reach. These arguments are unpersuasive.

a. The rule of lenity has no applicability unless a statute contains a "grievous ambiguity" in its language and structure (*Huddleston* v. *United States*, 415 U.S. 814, 831 (1974)). The rule resolves ambiguities, it does not create them (*Callahan* v. *United States*, 364 U.S. 587, 598 (1961)). Thus, no reason exists "to narrow the plain meaning of even a criminal statute on the basis of a gestalt judgment as to what Congress probably intended" (*Garcia* v. *United States*, slip op. 9). As we have shown, Congress clearly expressed its intention to exercise its commerce power to the fullest, and that power extends to arson of nearly all types of buildings. Thus, there is no reason to apply the rule of lenity. Furthermore, petitioner's argument is meritless because his proposed construction is contrary to Congress's intent, as we have shown.[24]

b. Nor is there reason to construe Section 844(i) narrowly to avoid federalism problems. Congress fully recognized in 1970 that it was criminalizing activity that was also criminal under state law. It clearly intended to provide overlapping jurisdiction—Section 848 provides that Congress did not intend to

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[24] In addition, the rule of lenity is based in part on the idea that criminal statutes should give "fair warning" (*McBoyle* v. *United States*, 283 U.S. 25, 27 (1931)). The Court in *Bass* recognized that the notion that a person will read the law to determine whether or not action is lawful is a fiction, but it nevertheless noted that the defendant's criminal action—possession of firearms by a felon—was not criminal in many states (404 U.S. at 348 n.15). That weighed in favor of applying the rule of lenity in *Bass*. In this case, by contrast, it cannot be argued that petitioner thought that burning down a residence was lawful.

preempt state law.[25] The subcommittee considered and rejected a provision that would have required the Attorney General to authorize prosecutions under Section 844 (*1970 Hearings* 32). It decided instead to rely upon government enforcement officials to determine which cases warranted federal involvement in either the investigation or the prosecution (*id.* at 76-77).[26]

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[25] Section 848 provides:

> No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

[26] The subcommittee determined that federal officials could, in any event, decide not to proceed under the federal statute in particular cases best left to local investigation or prosecution (*1970 Hearings* 77). One of the bill's authors recommended, "with respect to those situations which involve a duality of jurisdiction," that the Attorney General confer "with local authorities and with State authorities" in determining whether federal involvement is warranted (*id.* at 69-70).

At the 1982 hearing, enforcement officials from the Treasury Department testified that the Bureau of Alcohol, Tobacco and Firearms had "focused its resources in the arson area on those schemes involving commercial premises * * * or members of organized 'arson rings' " and would "continue its arson program under the same policies and guidelines." In this connection, a Treasury Department official testified that the bill would "not make every arson a federal crime." *1982 Hearing* 14. Congress approved the Bureau's focus on commercial property and arson rings (128 Cong. Rec. H4958 (daily ed. Aug. 2, 1982)). Congress thus broadly federalized arson law, relying upon federal officials to select appropriate cases for federal involvement and to leave other prosecutions to state and local authorities.

The statute at issue in this case is therefore very different from the firearms statute considered in *Bass*, which had been "hastily passed, with little discussion, no hearings, and no report" (404 U.S. at 344). In those circumstances, the Court construed the statute narrowly because it was unwilling to conclude from silence that Congress had "significantly changed the federal-state balance" (*id.* at 349). In contrast, in enacting Section 844 in 1970 and amending it in 1982, Congress was well aware that it was creating overlapping federal jurisdiction in areas of criminal law traditionally reserved to the states.

Moreover, state and local governments have generally welcomed federal involvement in cases brought under Section 844 and supported efforts to broaden it. At the *1970 Hearings*, reference was made to a dispute between city officials in Seattle and the Federal Bureau of Investigation. The city officials had asked the FBI to investigate a wave of bombings, but the FBI declined, citing a lack of jurisdiction (*1970 Hearings* 61-62). One of Congress's purposes in enacting Section 844 was to make clear that federal jurisdiction existed in such cases, so that the FBI could respond to requests from local officials when appropriate. In 1982, when Section 844 was amended to provide specifically for coverage of arson cases, the National Association of Attorneys General endorsed the bill.[27]

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[27] The Association stated, in part (128 Cong. Rec. S11986 (daily ed. Sept. 22, 1982)):

> Whereas, arson cases often include organized criminal elements that travel quickly between state lines making

In short, Section 844(i) covers criminal behavior that has traditionally been covered by state law. But Congress, in providing for overlapping federal-state coverage, was fully aware that it was taking that step, unlike the situation considered in *Bass*. Moreover, the states, rather than resisting federal involvement, have requested it.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
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Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

THOMAS E. BOOTH
Attorney

APRIL 1985

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state enforcement of some arson cases exceedingly difficult; and

Whereas, some federal enforcement of arson cases, whether started by fire or otherwise, is necessary in order to reduce the incidence of arson; * * *

* * * * *

Resolved That the National Association of Attorneys General supports [the pending bills].

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No. 84-435

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT RUSSELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

JOINT APPENDIX

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Pandick Midwest, Inc., Chicago • 454-7600
PETITION FOR CERTIORARI FILED, September 17, 1984
PETITION FOR CERTIORARI ALLOWED, February 19, 1985

INDEX TO JOINT APPENDIX

(Relevant) DOCKET ENTRIES

CR-83-00114-01

JS-V-RUSSELL

	8	Filed indictment (Dkt'd 03/14/83).
	17	Motion to dismiss filed (MOT#1) (Count 1) (Dkt'd 04/15/83).
	17	Memorandum in support of motion to dismiss (MOT#1) 4/15/83).
04/25/83	20	Motion to dismiss denied (MOT#1) (DRAFT) (JUDGE GETZENDANNER) (Dkt'd 04/28/83).
05/31/83	28	Trial begins-bench (Count 1) (Dkt'd 06/06/83)
	28	Motion made in open court to dismiss (MOT#4) 1)
	28	Motion to dismiss denied (MOT#4) (Dkt'd 06/06/83).
08/23/83	35	Sentencing of defendant (Count 1) (The court adjudged the defendant guilty as charged and convicted and ordered that: the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN(10) YEARS on count 1 of the indictment. The court revokes defendant's bond pending appeal).
	36	Filed notice of appeal (Count 1) (AAPL#1)
9/8/83	40	Filed 9/8/83 Transcript of proceedings had on 8/23/83.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Docketed
Mar 14 1983

UNITED STATES OF AMERICA

vs.

ROBERT RUSSELL

No. 83 CR 114
Violation: Title 18, United States Code, Section 844(i)

The FEBRUARY 1983 GRAND JURY charges:

On or about February 7, 1983 through February 10, 1983, at Chicago, Illinois and elsewhere in the Northern District of Illinois, Eastern Division,

ROBERT RUSSELL,

defendant herein, did maliciously attempt to damage and destroy a two-unit apartment building, commonly known as 4530 South Union, Chicago, Illinois, which was used in the activity affecting interstate commerce, by means of fire and by means of explosive, as that term is defined in 18 U.S.C. § 844(j);

In violation of Title 18, United States Code, Section 844(i).

A TRUE BILL:

/s/ Melvin H. Redmand
FOREPERSON

/s/ Dan Webb
UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. **ROBERT RUSSELL,** *Defendant.*	No. 83 CR 114

MOTION OF DEFENDANT TO DISMISS THE INDICTMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Now comes the defendant, Robert Russell, and moves the complaint be dismissed for lack of federal jurisdiction, and states:

1. He is charged with maliciously attempting "to damage and destroy a two unit *apartment building* . . . which was used in an activity affecting interstate commerce, by means of an explosive" as defined in 18 U.S.C. 844(j), and fire, in violation of 18 U.S.C. 844(i). (Emphasis added).

2. At the preliminary hearing, it was established that the building in question was a two-flat apartment building; one flat was occupied as a residence and one flat was empty; there was no commercial activity on the premises.

3. It was further alleged by the prosecutor that the government proposed to establish the "interstate commerce" jurisdictional nexus of the charge by proof that gas which travelled in interstate commerce was used to heat the building. No other interstate nexus was suggested.

4. Where the property involved is, as here, not *commercial* property, and there is no business, legitimate or otherwise,

being conducted from the premises, such building is not capable of being the subject of an offense under 18 U.S.C. 844(i), which, per the authorities cited in the attached Memorandum, does not apply to purely residential property.

5. In support hereof, defendant submits the attached Memorandum of Law.

WHEREFORE, defendant moves that the indictment be dismissed.

Respectfully submitted,

JULIUS LUCIUS ECHELES
35 East Wacker Drive
Chicago, Illinois 60601
Attorney for Defendant.

MEMORANDUM OF LAW

The Congressional committee in describing "business property" referred to "[T]he type of conduct punished by the statute [18 U.S.C. 844(i)], namely, the damage or destruction by explosion of business property *used* in interstate or foreign commerce or in an activity affecting such commerce, not to dwelling houses which were not being used for any commercial purpose at all." *United States v. Mennuti,* 639 F.2d 107, 111-12 (2 Cir. 1981). (Emphasis added).

Directly on point, *Mennuti* affirmed the District Court's dismissal of the indictment where, as here, the alleged target of the explosives was a *residential, not* a *commercial,* building. Accord, *United States v. Monholland,* 607 F.2d 1311 (10 Cir. 1979) (statute held not to apply to destruction of truck used by State judge traveling to and from work, though truck used fuel from interstate commerce, was insured by an interstate business, etc.)

All those cases finding the statute applicable involve *commercial* property, without exception. And no case was discovered wherein purely residential property, as here, was deemed subject to the statute.

Several Second Circuit cases decided subsequent to *Mennuti* expressly have reaffirmed that decision, finding federal jurisdiction on their respective facts where *commercial* property was involved. In *United States v. Barton,* 647 F.2d 224 (2 Cir. 1981), decided a few months after *Mennuti,* the reviewing court found that the buildings in question (which housed gambling operations):

> "... were used in activities affecting interstate commerce within the meaning of § 844(i). There was ample evidence that *the buildings were used for commercial activities."* 647 F.2d at 232. (Emphasis added).

The Court noted:

> "This [*i.e.*, that the buildings were used for commercial activities] distinguishes our recent decision in . . . [*Mennuti*], in which we held that § 844(i) does not apply to private dwellings, notwithstanding several interstate contacts involving financing, insurance, fueling, and use of building materials." *Id.* fn. 8.

And in *United States v. Giordano,* 693 F.2d 245 (2 Cir. 1982), decided this past November, the Court held a piano store fell within the ambit of the statute. Specifically holding that this decision was consistent with *Mennuti,* the Court stated:

> "*Mennuti* held that only commercial enterprises are covered by the statute; there is no claim here [*i.e.*, in *Giordano*] that defendants conspired to destroy a residential building, as in *Mennuti.*" 693 F.2d at 250.

In *United States v. Andrini,* 685 F.2d 1094 (9th Cir. 1982), the property held to be subject to the statute was a commercial building under construction. In the course of its opinion, the Court stated:

> "We have discovered only two cases in which circuit courts have not found § 844(i) jurisdiction, neither of which involved *commercial* property." [Citing *Mennuti* and *Monholland, supra.*] *Id.* at 1096. (Emphasis in original.)

Each of the cases finding federal jurisdiction under the statute involves property which was used commercially. See, *e.g., United States v. Nashawaty,* 571 F.2d 71 (1 Cir. 1978) (paint shop); *United States v. Sweet,* 548 F.2d 198, 202 (7 Cir. 1977) (tavern); *United States v. Schwanke,* 598 F.2d 575, 578 (10 Cir. 1979) (cafe); *United States v. Corbo,* 555 F.2d 1279, 1282 (5 Cir. 1977) (bookstore); *United States v. Keen,* 508 F.2d 986, 990 (9 Cir. 1974) (commercial fishing boat).

Copies of the *Mennuti* and *Monholland* decisions are attached for the Court's enlightenment. We commend Judge Friendly's opinion in *Mennuti* as a superb opinion, both for its end result and the analytical reasoning leading thereto.

The legislative history of the statute, as explicated by Judge Friendly, contains the telling phrase:

> "[T]his is a very broad provision covering substantially all *business property.*" [1970] U.S. Code Cong & Adm. News, 4007, at 4046, House Report No. 91-1549, Organized Crime Control Act of 1970, quoted in *Mennuti, supra,* 639 F.2d at 111. (Emphasis added.)

The government's position in the instant case—that is, that federal jurisdiction exists because gas from interstate commerce was used to heat the premises—is not well taken. That same position was expressly rejected in *Mennuti,* where the government's offer of proof included that "telephone lines, electric lines and other services provided at . . . [the residence] traveled in interstate commerce and affected interstate commerce." 639 F.2d at 108-09, fn. 1, par. 5. Rejecting this, the Second Circuit held:

> "[A] residence is not used in interstate or foreign commerce simply because . . . it received electric power and telephone service from companies engaging in or affecting commerce . . ." *Id.* at 110.

Accord, Barton's analysis of *Mennuti, supra,* that the statute:

> "does not apply to private dwellings, *notwithstanding* several interstate contacts involving . . . *fueling.*" 647 F.2d at 232, fn. 8. (Emphasis added.)

See also *Monholland, supra.* These authorities should suffice to defeat the government's claim.

CONCLUSION

The statute does not cover dwellings; it only applies to commercial property. Since here, a residential building is involved which was not used in any manner for commercial activities, the indictment should be dismissed.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for Defendant

(CERTIFICATE OF SERVICE OMITTED IN PRINTING.)

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

UNITED STATES OF AMERICA, *Plaintiff,*	
v.	No. 83 CR 114
ROBERT RUSSELL, *Defendant*	

MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, District Judge:

Defendant Robert Russell moves to dismiss the one-count indictment pending against him for failure to allege a crime punishable under the federal arson statute, 18 U.S.C. § 844(i). On the basis of the facts stated in the Government's responsive memorandum (construed as an offer of proof), this motion is denied.

The Government hopes to prove at trial that Russell maliciously attempted to damage or destroy, by means of fire or explosive, a two-unit apartment building situated at 4530 South Union Street in Chicago. The Government further hopes to establish that Russell resides at 11361 South Lawndale in Chicago, and that he owns the property at 4530 South Union for the purpose of renting it to the public. Evidence will apparently also be tendered that Russell owns at least three other rental properties, which, in combination with the South Union building, house numerous tenants who together pay the defendant approximately $1,900 a month in rent.

As to the property on South Union Street, the Government plans to show that at the time of the alleged acts, one unit of the building was rented to a family not related to Russell. The rent

charged was $225 a month. Apparently, the second unit was unoccupied. Natural gas originating in states other than Illinois was used to heat the premises at the time of the alleged incident.

The pertinent federal statute, 18 U.S.C. § 844(i), seeks to punish "[w]hoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." The Government contends that by proving the facts outlined above it will have shown that Russell "attempt[ed] to damage or destroy, by means of fire or an explosive, any building . . . used in . . . any activity affecting interstate or foreign commerce." Russell responds that since the subject premises were not used for "commercial" purposes, the necessary connection to interstate commerce cannot be shown.

The jurisdictional portion of the statute relied upon in the indictment plainly obligates the Government to prove three facts: first, that the attempted arson pertained to "any building"; second, that an "activity affecting interstate or foreign commerce" existed; and third, that the subject building was "used in" that activity. The Government's proposed proof addresses each of these factors.

The property at 4530 South Union clearly falls within the "any building" category. Further, the creation of heat from natural gas originating out of state is an "activity affecting interstate or foreign commerce." Such activity, moreover, is one in which the building at issue was unquestionably "used." The Government's proposed proof thus appears to satisfy the statute's literal terms. *See United States* v. *Barton,* 647 F.2d 224, 231-32 (2d Cir.), *cert. denied,* 102 S.Ct. 307 (1981) (approving a jury instruction that "[a] building is used . . . in an activity [a]ffecting interstate commerce . . . if oil or gas moving in interstate commerce is used to heat the building.");

United States v. *Zabic,* No. 82 CR 423, slip op. at 3 (N.D.Ill. Feb. 11, 1983) ("the activity of letting 43 units of dwelling space, including the provision of natural gas to each unit . . . is an activity affecting commerce)[1] Much lesser showings have passed muster. *See United States* v. *Grossman,* 608 F.2d 534 (4th Cir. 1979).

The court recognizes that the reasoning espoused above could have very broad application. ***But see*** note 2, *infra,* and accompanying text. However, the Seventh Circuit has clearly authorized expansive interpretations of the language of § 844(i). *See United States* v. *Sweet,* 548 F.2d 198, 201 (7th cir.), *cert. denied,* 430 U.S. 969 (1977) (suggesting that the statute reaches the bombing of a tavern selling only home-produced liquor products because such activity reduces the demand for liquor goods sold in interstate commerce). Congress enacted § 844(i)—as well the remaining provisions of Title XI of the Organized Crime Control Act of 1970—"to protect interstate and foreign commerce against interference

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[1] Thus, defendant's reliance upon *United States* v. *Monholland,* 607 F.2d 1311 (10th Cir. 1979), is misplaced. In *Monholland,* the Court refused to find that § 844(i) criminalized the bombing of a pick-up truck driven to work by a state court judge. The Government argued that the judge's business activities affected interstate commerce, and that he "used" his truck in his work routine. The Court was not persuaded:

> We say, then, that the truck is wholly immaterial as far as any commerce is concerned even if we assume that there is a commerce quality about what the judge does after he gets to court. . . . Since [the truck] is divorced from the activity carried on in court, there is no legal relationship whereby one can say that the truck affects commerce. . . . Our view has to be that, in law, the activity of the judge at the courthouse is remote from the use of the truck.

Id. at 1316. In this case, by contrast, it can hardly be said that the building in question is "divorced" or "remote" from the activities affecting interstate commerce.

and interruption by reducing the hazard to persons and property arising from misuse and unsafe or insecure storage of explosive materials." 18 U.S.C.A. § 841 note. The construction of the statute adopted here furthers this purpose.

Russell cites in response the Second Circuit's holding in *United States* v. *Mennuti,* 639 F.2d 107 (2d Cir. 1981), that the statute "does not apply to private dwellings." *United States* v. *Barton, supra,* 647 F.2d at 232 n.8; *accord, United States* v. *Giordano,* 693 F.2d 245, 250 (2d Cir. 1982). The court declines to rule in Russell's favor on the strength of *Mennuti* for several reasons. First, *Mennuti* does not announce the law of this Circuit; *Sweet* does, and, for the reasons given above, the reasoning found in that opinion, to the extent it is relevant at all, supports the Government's position, not Russell's.

Mennuti must also be read in context. The *Barton* Court's subsequent approval of the jury instruction quoted *supra* clearly shows that the Second Circuit agrees, as a general matter, that a building heated by out of state gas is thereby "used in" an "activity affecting interstate or foreign commerce" for purposes of the statute. *Mennuti* simply carves a "residential building" exception to this general rule. The statute, however, speaks of "any building," not "non-residential buildings." It should go without saying that the words of the statute must, if at all possible, be given their ordinary meaning. *See, e.g., United States* v. *Turkette,* 452 U.S. 576 (1981); *see also United States* v. *Fears,* 450 F.Supp. 249, 253 (E.D.Tenn. 1978) (the term "any building" in 18 U.S.C. § 844(e) means *any* building, including a personal residence) (emphasis in original).

It is acknowledged that the House report underlying § 844(i), though ambiguous, can be read to limit the statute's reach to "business property":

> Section 844(i) proscribes the malicious damaging or destroying, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or

> foreign commerce or in any activity affecting interstate or foreign commerce. Attempts would also be covered. Since the term affecting [interstate or foreign] "commerce" represents "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause," *NLRB* v. *Reliance Fuel Corp.*, 371 U.S. 224, 83 S.Ct. 312, 9 L.Ed.2d 279 (1963), this is a very broad provision covering substantially all business property

H.R. Rep. 91-1549, 91st Cong., 2d Sess. *reprinted in* [1970] U.S. Code Cong. & Admin. News 4046. But even conceding the propriety of the suggested limitation,[2] Russell's case is not advanced. For if the Government's proposed proof materializes, the evidence will show that Russell utilized the subject property in conducting his "side" business[3] of providing housing space for rent. From the perspective of the defendant, the building on South Union Street was very definitely "business

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[2] It should be stressed that the court's "concession" is made solely for purposes of discussion. The House Report's specific mention of "business property" does not necessarily carry with it the negative pregnant that all other property falls beyond the statute's reach. Indeed, evidence that such an inference should not be drawn is found in the immediately preceding statement in the Report that Congress meant to exercise its full power under the commerce clause. But in light of the precise facts presented herein, there is no need for the court to pursue this line of thought to its furthest reach. The court expresses no opinion as to whether § 844(i) criminalizes the bombing of an *owner-occupied* dwelling heated by out of state gas.

[3] According to the Government's brief, "[t]he defendant is a 17 year veteran of the Chicago Fire Department."

property" within the meaning of the House Report cited above.[4]

For all the reasons stated, defendant's motion to dismiss the indictment is denied.

It is so ordered.

/s/ Susan Getzendanner
Susan Getzendanner
United States District Judge

April 25, 1983

[4] The court recognizes that one of the buildings bombed in *Mennuti* was held out for rent, and that this factor was deemed irrelevant. With respect, this court does not find the reasoning of either the District Court (487 F.Supp. at 544 n.7) or the Court of Appeals (639 F.2d at 110) in *Mennuti* persuasive on this point.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

UNITED STATES OF AMERICA *Plaintiff,* *v.* **ROBERT RUSSELL,** *Defendant.*	No. 83 CR 114

MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, District Judge:

At the close of the government's proof and at the close of all of the evidence, the defendant moved for judgment of acquittal. First, defendant argues that the evidence does not establish the elements with respect to "attempt." The defendant is charged with attempting to damage and destroy 4530 South Union by means of fire and an explosive.

The government's discussion of the law of attempt accurately sets forth the law applicable to this case. On February 8th the defendant attempted to burn down the building by instructing Ralph Branch to burn down the building, by further instructing him on how to burn down the building and by Ralph Branch's actions in setting on fire a piece of wood close to the main beam supporting the building.

The defendant argues that Branch's conduct was not an attempt because Branch lacked intent to damage and destroy the building and his actual efforts to that end were a mere token gesture. Although Branch did testify that he did not think the building would burn, he in fact left an unattended fire in the basement of the building which clearly could have caused a major fire, and he returned later in the evening to see if the fire

had caught in order to warn the occupants of the building of the fire.[1] The facts belie Branch's self-serving testimony that he did not intend to start the fire.

The next attempt by the defendant to destroy the building was an attempt by means of an explosive. This occurred the next day. That defendant attempted to destroy the building by means of an explosive is established by the fact that he instructed Branch to use gasoline, and the defendant in fact purchased five gallons of gasoline and placed it in the basement of the building. This conduct constitutes attempt. The defendant arranged for an alibi for the time he instructed Branch to burn the building.

The defendant's criminal intent to destroy and damage the building as discussed above is fully and conclusively proved by the recording of his telephone conversation with Branch.

Next defendant argues that the requisite interstate commerce impact has not been proven in this case. The court has already ruled that a two-flat building owned as investment property and rented to others which uses interstate gas satisfies the interstate commerce requirement of the statute. The defendant now relies on the evidence that only a very small amount of gas was furnished to the building and that it is possible that the gas furnished to the premises was manufactured within Illinois. These arguments are rejected. The Peoples Gas witnesses testified that 97% of the gas sold to consumers in the City of Chicago was interstate gas. Although

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[1] The defendant asserts that after leaving the building, Branch went across the street to observe the building and warn the residents if the fire actually caught. The government asserts that Branch left the building and walked a few blocks before returning to the building to see if the fire had caught. The court's own recollection of the testimony is that Branch left the building, went to a tavern and consumed two six-packs of beer before returning to the building. If the court's recollection is correct, Branch's asserted concern for the occupants of the building seems a mere afterthought.

they did not break down what portion of the gas bill generated by the use of gas at the building was attributed to Peoples Gas's overhead versus its actual purchase price for the interstate gas, I find this irrelevant to the interstate commerce analysis.

Accordingly, the court finds that the government has proved the defendant guilty as charged in the indictment beyond a reasonable doubt, and denies defendant's motion for judgment of acquittal at the close of the government's evidence and the close of all of the evidence. Judgment of guilty on each count of the indictment is entered against the defendant. Sentencing is set for August 23, 1983, at 9:30 a.m.

/s/ SUSAN GETZENDANNER
Susan Getzendanner
United States District Judge

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[98] **BETTY STEPHENS,**
GOVERNMENT'S WITNESS, SWORN

DIRECT EXAMINATION BY MS. GIACCHETTI:

Q State your name and spell it for the Court Reporter.

A Betty Stephens, S-t-e-p-h-e-n-s.

Q And what city do you live in, Miss Stephens?

A Chicago, Illinois.

Q Did you ever live at the location of 4530 South Union in Chicago?

A Yes, ma'am.

Q When did you live there?

A From September of '82 to May of '83.

Q And who did you live there with?

A My husband and six children.

Q What is your husband's name?

* * *

[100] if I could see the place. He took me up and showed it to me. And then it was Robert Russell; he rented me the place.

Q Okay. Was that the man sitting on the porch, was Robert Russell?

A Yes, ma'am.

Q Looking around the courtroom today, is Robert Russell in the courtroom?

A Yes, ma'am.

MR. ECHELES: We will stipulate she has identified Robert Russell.

THE COURT: Thank you.

MS. GIACCHETTI: Thank you.

BY MS. GIACCHETTI:

Q And which of the apartments at 4530 South Union did you rent?

A Second-to-the-front. Well, though, it went all the way through.

Q How much did you pay?

A $225 a month.

Q And in what form did you pay Robert Russell?

A In a check.

Q Okay. What check—what bank was your check written on?

A From Winter Haven, Florida; Exchange Bank.

Q Now, New, did there ever come a time when you had a discus-

* * *

[103] now that the prosecutor has told the witness.

THE COURT: Yes.

MR. ECHELES: There is nothing I can do about it, but I still object and move it be stricken.

THE COURT: Your objection is noted. I won't strike it, but, Miss Giacchetti, please refrain from leading the witness.

BY MS. GIACCHETTI:

Q How was your apartment heated?

A With natural gas.

Q What did you use as cooking fuel?

A Natural gas.

Q Okay. Did you have any other appliances in your apartment?

A The space — a space heater, and a gas dryer.

Q And what did those use as fuel?

A Pardon me?

Q What kind of fuel did those appliances use?

A Natural gas.

Q Okay. How was your water heated?

A Through natural gas.

Q Where did you get your natural gas?

A People's Gas.

Q Approximately what period of time you have--did you receive natural gas from People's Gas?

* * *

[121] Customer Relations.

Q Now, during your employment at People's Gas, have you become familiar with the procedure used to supply natural gas or supply gas to the City of Chicago?

A Yes, I have.

Q And where does that—what type of gas is supplied to the City of Chicago?

A Well, 97—approximately 97 percent of our supplied to the City is natural gas from wells in Texas, Oklahoma, Louisiana, and off the Gulf of Mexico—or, off the coast in the Gulf of Mexico.

Q Okay. And what is the other 3 percent?

A That is our synthetic natural gas that we produce near Joliet where we take ethane by pipeline from Kansas and convert it into methane and commingle it with our natural gas supply coming into the City of Chicago.

Q Now, how does—you said the natural gas comes from what two locations?

A Well, we have—there are two areas that our pipeline suppliers have gas wells that they supply the City. One is what we call the Amarillo area in Texas, and that—those pipelines come through Texas, Oklahoma, Kansas, Nebraska, Iowa, Illinois and then into the Chicago area.

The other area is Louisiana, Southeastern Texas area where the gas comes through Arkansas, Missouri,

* * *

[153] THE COURT: We will admit that, and I have corrected my copy.

(The exhibits are received in evidence.)

THE COURT: All right. Page 10?

MR. ECHELES: I object. It has to do with an insurance policy on an address that is not the address of the property in question.

MS. GIACCHETTI: Judge, the next three stipulations deal with insurance policies, and basically they are being offered — the insurance policies on 4530 and the other three pieces of what we have characterized as commercial or business property are covered by standard fire policies that are issued for business or commercial property as distinguished from policies — homeowner's policies issued to a residence, and so that is the purpose of offering those policies, is again that it is a business as opposed to a residence and is operated as such by the defendant.

MR. ECHELES: Those are Pages 10, 11 and 12, your Honor. We object.

THE COURT: But if they are offered only for that limited purpose of showing that those other properties were in fact treated as business properties by the defendant, I will admit them for that limited purpose, over the objection of the defendant.

(Stipulation Pages 10, 11 and 12 are received in evidence.)

MS. GIACCHETTI: Okay. And then with those we of course move 15, 16, 17, 18, 19, 21-A and 21-B, as referred to in those stipulations.

MR. ECHELES: Those are the insurance policies themselves.

[Page 11 of Government's proferred stipulations.]

If called to testify under oath, T. L. Derrick would testify as follows:

1. He is Underwriting Division Manager for Allstate Insurance Company, an insurance company located at 7770 Frontage Road, Skokie, Illinois 60077.

2. Allstate Insurance provides insurance coverage for the defendant Robert Russell for the premises located at 4530 South Union, Chicago, Illinois; 4600 South Union, Chicago, Illinois; and 11361 South Lawndale, Chicago, Illinois.

3. Government Exhibits 17 and 18 are fire insurance policies covering 4530 South Union, Chicago, Illinois, and 4600 South Union, Chicago, Illinois. These policies cover tenant occupied properties for fire damage only. Government Exhibit 19 is a homeowners policy for 11361 South Lawndale, Chicago, Illinois. This policy covers the property that is used as a residence by the defendant Robert Russell.

4. Allstate as a matter of policy differentiates between owner occupied property and rental property.

5. Government Exhibits 17, 18 and 19 are business records of Standard Service Corporation and are admissible into evidence under Rule 803(6) of the Federal Rules of Evidence.

No. 84-435

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT RUSSELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

Petitioner primarily relies on his original Brief.

Responding *seriatim* to the sections of the government's Argument:

(1) First, the government attacks petitioner's position that the statute, 18 U.S.C. 844(i), is restricted to business (as

opposed to residential) property, arguing: (i) that such restriction specifically was rejected when the section was enacted in 1970; (ii) that examination of sec. 844(e) confirms that Congress intended no distinction between residential and business property; and (iii) that the legislative history on which petitioner primarily relies is not inconsistent with the conclusion that Congress exercised its commerce power fully.

To respond:

(i) The government points out that section 844(i), as originally proposed, prohibited the destruction of "any building * * * *used for business purposes* by a person engaged in commerce or in any activity affecting commerce," (emphasis added by government; G. Br. 10), and that this phrase was deleted after testimony and discussions at the 1970 Hearings on Explosives Control, (cited by government at G. Br. 11, *et seq.*), because of a desire to cover such premises as churches and schools, which would have been excluded from the section's coverage, had the phrase not been deleted. (G. Br. 11) The language that was included in the bill as enacted, "any building . . . used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," 18 U.S.C 844(i), still requires that the building be *used* in commerce or in an activity affecting commerce. Petitioner submits this language does not justify coverage of residential (albeit rental) property, as at bar, because this property was not "used in . . . commerce or in any activity affecting . . . commerce." Deletion of the "business purposes" phrase in order to extend coverage to buildings such as churches and schools does not eliminate the requirement for a logical interstate commerce nexus vis-a-vis *use* of the building.

(ii) Because section 844(e) applies to threats to destroy "any building," regardless of its use, if such threats are made "through the use of the mail, telephone, telegraph, or other instrument of commerce," 18 U.S.C. 844(e), the government argues this demonstrates an intent

that sec. 844(i) cover "any building" as well. (G. Br. 12-13) But the government overlooks that the use of the interstate communication facility itself provides the interstate nexus for sec. 844(e). Since there is no such communication facility nexus with respect to sec. 844(i), that section's requirement, "used in . . . commerce or in any activity affecting . . . commerce," provides the necessary jurisdictional nexus. Thus, *United States v. Fears,* 450 F.Supp. 249 (E.D. Tenn. 1979), (G. Br. 8, fn. 7 & G. Br. 12), holding that a telephone threat to destroy residential property was covered by sec. 844(e), is not persuasive with respect to construction of sec. 844(i); for the interstate communication facility nexus in sec. 844(e), construed in *Fears,* removes the necessity for an interstate nexus with respect to the building itself.

(iii) Immediately following the statement that sec. 844(i)'s use of the phrase "affecting commerce" "represents 'the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause,'" comes the language on which petitioner (and the *Mennuti*[1] decision) relies: "[T]his is a very broad provision covering substantially all business property." [1970] U.S. Code Cong. & Adm. News 4007, at 4046, House Report No. 91-1549, Organized Crime Control Act of 1970, at 69-70. (See Pet. Br. 10, 15-16.) The government points out that the statement regarding "business property" "may be regarded as providing an important example of property that Section 844(i) covers." (G. Br. 13) We submit it may be just as reasonably regarded as a description of the entirety of the property covered, and that the interpretation advanced by the government (and espoused by the District Court[2], 563 F.Supp. at 1088 n.2; see G. Br. 13), rests on unsupported supposition.

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[1] *United States v. Mennuti,* 639 F.2d 107 (2 Cir. 1981).

[2] *United States v. Russell,* 563 F.Supp. 1085 (N.D. Ill. 1983).

(2) Second, the government argues that the building in question was "used in * * * [an] activity affecting interstate commerce" (G. Br. 6) in three ways: (i) the building was heated by gas that moved in interstate commerce, (ii) it was used for rental purposes, and (iii) petitioner attempted to use it to defraud an insurance company.

While petitioner does not quarrel with the principles of any of this Court's decisions cited and relied on by the government as to the scope of the commerce clause, (G. Br. 8-9, 14-15), none of those decisions is directly in point, and none gives any particular guidance with respect to any of the factors upon which the government relies. To respond:

(i) Neither of the Court of Appeals decisions relied on by the government in support of the "interstate fuel" nexus theory is persuasive. (G. Br. 16) In *United States v. Barton*, 647 F.2d 224 (2 Cir. 1981), the reviewing court found that consumption in the building of coffee and orange juice from out-of-State, and use of out-of-State fuel in heating the building, constituted "alternative jurisdictional predicates." *Id.* at 232-33.[3] The government has pointed to no decisions resting on a nexus of interstate fuel. It argues that *United States v. Andrini*, 685 F.2d 1094 (9 Cir. 1982), holding that an office building under construction with interstate materials was covered by the statute, inferentially supports the argument that where an interstate nexus exists apart from the use of the building, the use thereof is irrelevant. Since the building under construction in *Andrini* was to contain commercial enterprises, this argument is moot speculation.

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[3] The court in *Barton* noted that the commercial use of the buildings distinguished that case from *Mennuti*, "in which we held that § 844(i) does not apply to private dwellings, *notwithstanding several interstate contacts involving* financing, insurance, *fueling*, and use of building materials." *Id.* at 232 n.8. (Emphasis added.)

(ii) In support of its position that the building was "used in an activity affecting interstate commerce because he rented it," (G. Br. 17), the government relies on *United States v. Hansen,* No. 84-1500 (8 Cir., decided Feb. 22, 1985), and *United States v. Zabic,* 745 F.2d 464 (7 Cir. 1984), (G. Br. 17-18), holding a 14-unit and a 43-unit apartment building, respectively, within the scope of sec. 844(i). The facts of those cases justify a finding that each building was used in an activity affecting commerce. These decisions are fully discussed, and factually distinguished from the case at bar, in Petitioner's Brief, pp. 7-8. We submit the difference is not merely one of degree. (*Cf.* G. Br. 18.)

The government's additional reliance on *McLain* v. *Real Estate Board,* 444 U.S. 232, 62 L.Ed.2d 441 (1980), (G. Br. 17), reversing dismissal of a Sherman Act complaint, is ill-advised; for while this Court recognized that in a factual showing at trial, "it may be possible for petitioners to establish that . . . an appreciable amount of interstate commerce is involved with the local residential real estate market arising out of the interstate movement of people," *id.* at 245, 62 L.Ed.2d at 452-53, this aspect of the decision outlines what the future proof might possibly show, and does not support the conclusion that the rental (or sale) of residential units necessarily affects the interstate movement of people. The interstate nexus deemed sufficient to defeat respondents' motion to dismiss the complaint for lack of jurisdiction under F.R.C.P. 12(b)(1) was, per this Court, on established (not hypothetical) facts, that the sale of local residential real estate necessarily entailed title insurance and real estate financing involving interstate corporations and lending institutions. *Id.* at 245, 62 L.Ed.2d at 452.

(iii) The government's argument that petitioner's attempt to destroy the building to defraud an insurance

company provides the interstate nexus, rests upon subsequent legislative history of sec. 844(i). (G. Br. 18-20) The government concedes there are no decisions even arguably supporting this position. (See G. Br. 20, fn. 23.)

Indeed, the same legislative history supports petition's position that Congress intended to exclude residential property from sec. 844(i). When Congress amended sec. 844(i) in 1982, to clarify that arson "by fire" as well as bombing was included, it could have, but did not, amend the section so as to overrule *Mennuti, supra.* Assuming that at least some of the legislators are lawyers, and that their expertise included an awareness of the Second Circuit's *Mennuti* position excepting small-scale, residential (though rental) property from the statute's reach, their failure to overrule *Mennuti* by subsequent legislation—as they could well have done—when other aspects of the section were revised in 1982, is inferential proof that Congress had no intention of including the "one-tenant building."

(3) Finally, the government argues (i) that the "rule of lenity" in statutory construction does not apply here, because the statute is not ambiguous, and (ii) that there is no need for narrow construction to avoid federalism problems.

While the section here in issue is clear to the government, which perceives it as applying to a two-flat building, it is equally clear to the Second Circuit in *Mennuti, supra,* that such a building is not within the section. Therefore, it must be ambiguous, in that rational persons have construed it with opposite conclusions. While Congress expressed its intention to exercise its commerce power to the fullest, reasonable men reasonably have differed as to the scope of the phrase, "used in commerce or in any activity affecting commerce."

We fail to perceive the significance of Congressional consideration and rejection of a requirement that the Attorney

General authorize prosecutions, or of the later decision to rely on discretionary decisions by government enforcement officials respecting "which cases warranted federal involvement . . ." (G. Br. 22); that "Congress was well aware it was creating overlapping federal jurisdiction in areas of criminal law traditionally reserved to the states." (G. Br. 23) Nor does it seem to matter—in terms of statutory construction principles—that local law enforcement authorities have "requested" "federal involvement." (G. Br. 24)

Although federal enforcement officials testified at the 1982 hearing that the Bureau of Alcohol, Tobacco and Firearms had "focused its resources in the arson area on those schemes involving commercial premises * * * or members of organized 'arson rings,'" and Congress expressly approved this focus, (see G. Br. 22, fn. 26, citing Hearings), "relying on federal officials to select appropriate cases for federal involvement and to leave other prosecutions to state and local authorities," (G. Br. 22, fn. 26), the instant case demonstrates that federal prosecution is not limited to such area of focus—and for that reason, the section, as utilized in reality, in this case, does "make every arson a federal crime," (G. Br. 22, fn. 26), contrary to the testimony of a Treasury Department official that the bill "would not make every arson a federal crime."

* * *

We were not merely indulging in humorous speculation when we posited the *extremis* example of the outhouse as possibly the last bastion outside the reach of the commerce power. (See Pet. Br. 17.) While the government has not responded to this *"reductio ad absurdum"* argument, we wonder whether, if it did, the argument would be (*c.f.* G. Br. 18) that it is only "a matter of degree." But it is precisely when the degree becomes so relatively minuscule that it becomes *"de minimus,"* that it is no longer merely a matter of degree; it becomes a matter of substance, affecting the very quality of the thing.

* * *

It stretches both logic and language beyond their permissible scope to adopt the government's position as to the proper construction of sec. 844(i). Neither the interstate fuel nexus, nor the fact that a single tenant rented a flat, nor petitioner's intent to defraud an insurance company, establishes the statutory element—here, a jurisdictional requirement as well—as that the building was "used in or in an activity affecting commerce." This is one of those cases that should have been left to enforcement by the States, per the federal enforcement officials' supposed guidelines. (See G. Br. 22, fn. 26.)

This Court should so construe the statute as to except therefrom the building in this case, because on the evidence, it was not "used in or in an activity affecting commerce."

CONCLUSION

For the reasons stated in Petitioner's Brief, as amplified by this Reply, petitioner's conviction should be reversed.

Respectfully submitted,

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FREDERICK F. COHN
KATHLEEN KELLER
Attorneys for Petitioner

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* Researcher-amanuensis Caroline Jaffe participated in preparation of this Reply.